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Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, an individual;
MARGUERITE JACOBS, an individual;
MORT BAKER, an individual;
RICHARD LAWHORN, an individual;
ANTHONY KERSHAW, an individual;
and LEVIN-ZEMEL, INC., a corporation,

*Appellants,*

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation;
THE BERKELEY CITY COUNCIL; THE BERKELEY RENT
STABILIZATION BOARD; DOES I through XX, inclusive,

*Appellees.*

**On Appeal from the Supreme Court of the State of California**

## APPENDIX TO JURISDICTIONAL STATEMENT

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## APPENDIX A

IN THE

# Supreme Court of California

**S.F. No. 24675**
**Super. Ct. No. 536602-6**

ALEXANDRA FISHER et al.,
*Plaintiffs and Appellants,*

vs.

CITY OF BERKELEY, et al.
*Defendants and Respondents.*

[Filed December 27, 1984]

## OPINION

Plaintiffs, a group of landlords who own property in the City of Berkeley, appeal from a judgment of the Alameda County Superior Court holding defendants' rent control ordinance constitutional on its face. We substantially affirm the judgment.

Plaintiffs claim that defendants' ordinance conflicts with, and hence is preempted by, federal antitrust law because it is a combination that unreasonably restrains interstate commerce in violation of section 1 of the Sherman Antitrust Act (Act or Sherman Act). (15 U.S.C.) They also claim that it constitutes monopolization, or attempted monopolization, in violation of section 2 of the Act. (Ibid.) Although price fixing by private business e[illegible]rprises is clearly illegal per se, we hold that the per se rule of illegality does not apply to the municipal defendants'

price-fixing ordinance in this case. Nor can such a municipal regulation be reviewed pursuant to the traditional rule of reason, under which validity would be judged solely by the regulation's effect on competition. Instead, we have determined that when the validity of an ordinance is challenged under the federal antitrust laws, courts must adapt traditional antitrust rules in order to accommodate municipal governments' legitimate interest in enacting economic and social regulations concerning local health, safety and welfare. We conclude that if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an even handed manner, it must be upheld against a claim that it conflicts with section 1 or 2 of the Sherman Act unless the plaintiff demonstrates that the city's purpose could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies. No such means have been proposed. Under the foregoing test the ordinance in question has not been shown to conflict with federal antitrust laws.

We also conclude that defendants' ordinance is facially constitutional under both the federal and state due process clauses: a rent control ordinance is valid if it guarantees each landlord a fair return on his investment; it need not guarantee a fair return on the value of property. Furthermore, the ordinance on its face provides for reasonably prompt access to adjustment procedures for those landlords seeking to increase rents. Additionally, we conclude that the rent withholding provisions of the ordinance do not violate landlords' due process rights, nor are such provisions preempted by general state law. Finally, however, we have determined that the ordinance is invalid to the extent it purports to create an evidentiary presumption affecting the burden of proof in regard to retaliatory evictions, but that such a provision is severable, and does not affect the validity of the remainder of the ordinance.



## BACKGROUND AND PROCEDURE

In June 1980 the Berkeley electorate enacted initiative "Measure D," the "Rent Stabilization and Eviction for Good Cause Ordinance," (hereafter ordinance). The ordinance affects approximately 23,000 rental units.

Section 3 sets out the purpose of the ordinance: It is intended "to regulate residential rent increases in the City of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the City of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of this City with regard to low and fixed income persons, minorities, students, handicapped, and the aged."

Section 5 exempts from the ordinance government-owned units, transient units, cooperatives, hospitals, certain small owner-occupied buildings, and all newly constructed buildings. Section 6 establishes a rent stabilization board (Board) of nine commissioners, and sets out its powers, duties, rules and procedures, as well as a means of ending rent control if the city's vacancy rate surpasses 5 percent. Section 8 requires landlords to register with the Board, furnish specified information, and pay a registration fee for each unit.

Section 10 establishes base rent ceilings[1] that landlords may not exceed except as permitted by the Board under sections 11 and 12. Section 11 provides for annual general adjustment of rent ceilings to cover increases or decreases relating to utilities and taxes. In making such general adjustment, the Board is given authority to adopt a general formula based on available data relating to such expenses. If a landlord is not satisfied with this general increase, he may petition the

[1] The base rent ceiling is the rent as of May 31, 1980. Regarding rental units for which there was no periodic rent in effect on that date, or during the six months preceding that date, the base rent ceiling is a "good faith estimate" of the median rent in effect for comparable units in the City of Berkeley on May 31, 1980.

Board for an individual adjustment under section 12. In ruling on this petition the Board must consider many nonexclusive factors, including a landlord's individual costs, but in no event may it deny a rent increase needed to allow a landlord a "fair return on investment."

Section 13 prohibits evictions except for enumerated factors constituting "good cause." Section 14 prohibits retaliatory evictions, and states that any eviction action taken against a tenant within six months of the tenant's assertion of rights under the ordinance shall be "presumed" to be retaliatory.

Section 15 sets out remedies, including rent withholding, both for a landlord's violation of rent ceilings and failure to register. Section 16 is a severability clause. Section 17 declares that the provisions of the ordinance may not be waived. Section 18 provides for judicial review of any act of the Board.

Plaintiffs filed suit in August 1980 seeking injunctive and declaratory relief against enforcement of the ordinance. They alleged the ordinance is unconstitutional on its face and as applied. The trial court granted defendants' motion for judgment on the pleading, declaring the ordinance constitutional on its face. The court granted plaintiffs leave to amend to allege facts showing that the ordinance is unconstitutional as applied, but plaintiffs subsequently dismissed this aspect of the complaint. Plaintiffs appeal from the trial court's order granting defendants judgment on the pleadings. The sole question before us, therefore, is whether the ordinance is invalid on its face.[2]

After the case was fully briefed on the merits in the Court of Appeal, but before that court rendered its decision, the United States Supreme Court decided *Community Commu-*

[2] While the case was pending on appeal the Berkeley electorate enacted the "Tenants' Rights Amendments Act of 1982," revising certain sections of the ordinance, including two sections relevant to our inquiry in this case: section 11, quoted *post* at page *, footnote 44, and section 14, quoted *post* at page **, footnote 54. Although the amendment was not before the trial court at the time it held the ordinance facially constitutional, any issues that may arise as a result of the amendments are questions of law and thus may be properly resolved by this court in determining facial validity. Therefore we will review the regulation as amended.

* *Infra* A-47.

** *Infra* A-54.



*nications Co.* v. *City of Boulder* (1982) 455 U.S. 40, holding a home rule municipality subject to federal antitrust scrutiny. We granted hearing, and soon thereafter the issue of the effect of *Boulder,* and antitrust law generally, was raised for the first time by amicus curiae. Both parties and additional amici curiae for both parties were granted leave to file, and have filed, supplemental briefs addressing inter alia antitrust issues generally, and the *Boulder* issue specifically.

Therefore, although plaintiffs claim the ordinance is facially invalid in whole or in part on due process and statutory grounds, they also assert that an alleged conflict between the ordinance and federal antitrust law presents a threshold issue dispositive of this appeal. Defendants likewise request that we address and resolve plaintiffs' antitrust contentions.[3] Because of the extreme importance of the issues presented, we proceed to analyze plaintiffs' antitrust claims.

[3] It is well settled that a court will consider on appeal a new point of law decided while the appeal is pending. (Claremont Imp. Club v. Buckingham (1948) 89 Cal.App.2d 32, 33.) Although prior to *Boulder* there existed a plausible basis for alleging a municipal regulation to be in conflict with antitrust laws pursuant to *City of Lafayette* v. *Louisiana Power & Light Co.* (1978) 435 U.S. 389 (discussed *post,* pp. - *), that case involved proprietary, rather than regulatory conduct, and hence such a claim could not reasonably have been expected to survive demurrer. In a real sense, therefore, the spectre of antitrust scrutiny of municipal regulatory conduct first arose in *Boulder.*

It is also established that on appeal from judgments granting or denying an injunction, the court applies the law that is current at the time of the decision. (*Cal-Dak Co.* v. *Sav-On Drugs, Inc.* (1953) 40 Cal.2d 492, 496-497 [congressional amendment of antitrust laws while appeal pending given effect to exempt a manufacturer from Sherman Act §1 charges]; see also *M Restaurants, Inc.* v. *San Francisco Local Joint Exec. Bd. Culinary etc. Union* (1981) 124 Cal.App.3d 666, 673.) Further, we have held that parties may advance new theories on appeal when the issue posed is purely a question of law based on undisputed facts, and involves important questions of public policy. (*Frink* v. *Prod* (1982) 31 Cal.3d 166, 170 (plurality decision); *Carman* v. *Alvord* (1982) 31 Cal.3d 318, 324; *UFITEC, S.A.* v. *Carter* (1977) 20 Cal.3d 238, 249, fn. 2; *Wong* v. *Di Grazia* (1963) 60 Cal.2d 525, 532, fn. 9; *Tyre* v. *Aetna Life Ins. Co.* (1960) 54 Cal.2d 399, 405; *Burdette* v. *Rollefson Construction Co.* (1959) 52 Cal.2d 720, 725-726.) In *Di Grazia,* supra, we rejected defendants' contention that because an issue regarding the rule against perpetuities had not been raised at trial, it would be improper for this court to address the question on appeal. Justice Tobriner, writing for the court, suggested that defendants' contention was meritless, and that "in any event, the issue as to the rule against perpetuities [is of]

*(Footnotes continued on following page)*

## I.

## Antitrust Issues

In *Birkenfeld* v. *City of Berkeley* (1976) 17 Cal.3d 129, we held Berkeley's former rent control ordinance facially unconstitutional because its procedures for rent adjustment were "inexcusably cumbersome" and would have deprived landlords of due process if permitted to take effect. (Id. at p. 173.) Before reaching that conclusion, however, we addressed the threshold question of the city's power to provide for rent control. We observed that our Constitution confers on all cities and counties the power to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with the general laws" (Cal. Const., art. XI, § 7) and noted that "[a] city's police power under this provision can be applied only within its own territory and is subject to displacement by general state law but otherwise is as broad as the police power exercisable by the Legislature itself." (17 Cal.3d at p. 140.) Although there is extensive regulation governing various aspects of landlord-tenant relations, "California has no state rent control statute." (Id. at p. 141.) We therefore concluded that the Berkeley ordinance was within the city's police power: there was "no legislative indication of 'a paramount state concern [which] will not tolerate further or additional local action.' " (Id. at p. 142, quoting *In re Hubbard* (1964) 62 Cal.2d 119, 128.)

Conceding that local rent control is not preempted by state law, plaintiffs champion federal antitrust law in order to attack *Birkenfeld's* premise that the police power of a city is as broad as that power exercisable by the Legislature.

Plaintiffs observe that although our state Constitution grants cities police power equal to that of the state, we are duty-

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considerable public interest; it has been fully argued before this court; we, accordingly, dispose of the issue on its merits." (60 Cal.2d 525, 532, fn. 9.) We believe that the validity of municipal rent controls under antitrust law raises extremely significant issues of public policy and public interest. (See, e.g., Goodrich, *The Limits of Municipal Power* (Mar. 1984) 4 Cal. Law. 26; Speigel, *Local Governments and the Terror of Antitrust* (1983) 69 A.B.A.J. 163.)



bound under the supremacy clause of the federal Constitution (art. VI, § 2) to invalidate a municipal regulation that on its face violates paramount federal law. (*Sail'er Inn, Inc.* v. *Kirby* (1971) 5 Cal.3d 1, 10-11.) They argue that (1) the city's ordinance, on its face, conflicts with federal antitrust law; that (2) under *Boulder,* the ordinance is not exempt from antitrust scrutiny, and hence (3) defendants have no authority to enforce the regulation in question. We clearly have jurisdiction to decide such claims. (*Rice* v. *Norman Williams Co.* (1982) 458 U.S. 654, 659-661; see *Rice* v. *Alcoholic Beverage Control Appeals Bd.* (1978) 21 Cal.3d 431, 439-446 [state retail price maintenance scheme for distilled liquor invalidated under § 1 of the Sherman Act]; *Midcal Aluminum, Inc.* v. *Rice* (1979) 90 Cal.App.3d 979, 982-984 [enjoining enforcement of state wholesale price maintenance scheme for wine as invalid under § 1 of the Act], affd. *sub nom. California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.* (1980) 445 U.S. 97; *Capiscean Corp.* v. *Alcoholic Beverage Control Appeals Bd.* (1979) 87 Cal.App.3d 996, 999-1000 [invalidating state retail price maintenance scheme under *Rice* v. *Alcoholic Beverage Control,* supra].)[4]

### A. State Action, Municipal Action, and Federal Antitrust Law

In order to prohibit private businesses from practicing various anticompetitive activities in interstate commerce, nearly a century ago the United States Congress exercised its broad authority under the commerce clause (U.S. Const., art. I, § 8, subd. (3)) to enact the Sherman Act. (Pub. L. No. 51-190, 26

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[4] We are aware that some decisions broadly declare that "state courts have no jurisdiction to construe or enforce the federal antitrust laws." (*Classen* v. *Weller* (1983) 145 Cal.App.3d 27, 34, fn. 2 [concession by counsel]; *Union Oil* v. *Chandler* (1970) 4 Cal.App.3d 716, 726.) Plaintiffs in this case, however, do not seek a private remedy against defendants; instead, they seek to enjoin enforcement of a local regulation alleged to be facially unconstitutional under the supremacy clause. It is clear that state courts may both construe and "enforce" the federal antitrust statutes for the purpose of ruling on such facial attacks. (*Rice* v. *Norman Williams Co.* (1982) 458 U.S. 654, 658, fn. 4, revg. on other grounds *Norman Williams Co.* v. *Rice* (1980) 108 Cal.App.3d 348, 354, fn. 2.) We do not construe *Classen* or *Union Oil* to suggest that state courts lack jurisdiction to review facial attacks premised on alleged conflict with federal antitrust laws.

Stat. 209 (1890) codified as amended at 15 U.S.C. §§ 1-7; see *Parker* v. *Brown* (1943) 317 U.S. 341, 351, citing Remarks of Sen. Sherman, 21 Cong. Rec. 2457, 2562 (1890).) Two sections of the Act are relevant to the present case. Section 1 declares that all contracts, combinations or conspiracies in restraint of interstate commerce to be illegal. Section 2 declares that the act of monopolizing, or attempting to monopolize any part of interstate commerce is illegal. Quite obviously, if defendants' ordinance conflicts with the Act, and further, if it is not exempt from antitrust scrutiny, the supremacy clause of the federal Constitution requires that we declare the ordinance invalid.

Over 40 years ago, the Supreme Court in *Parker,* supra, held this state's raisin marketing program, which restricted competition and maintained prices in order to protect the local raisin market, was not subject to federal antitrust scrutiny. The court found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress. [¶] The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. . . . [¶] There is no suggestion of a purpose to restrain state action in the Act's legislative history." (317 U.S. at pp. 350-351.) The *Parker* court concluded that "[t]he state in adopting and enforcing the . . . program . . . as a sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." (Id. at p. 352.)

In a series of cases over the last decade the United States Supreme Court has considered the extent to which private, or nongovernmental, business enterprises may come under the protection conferred in *Parker*.[5] And in two recent decisions, the court has addressed the conditions under which local

[5] In *Goldfarb* v. *Virginia State Bar* (1975) 421 U.S. 773, the court held minimum fee schedules for lawyers enforced by the state bar subject to scrutiny under the Act. The state bar's status as an agent of the state supreme

*(Footnotes continued on following page)*



governments may gain *Parker* protection. The first case, *City of Lafayette* v. *Louisiana Power & Light Co.* (1978) 435 U.S. 389, involved two Louisiana municipalities that owned and operated their own electric utility systems. *Louisiana Power* alleged that the municipalities had engaged in illegal tying arrangements with their customers.

*(Footnotes continued from preceding page)*

court did not make its fee schedule "state action" because such anticompetitive conduct was not "compelled by direction of the State acting as a sovereign." (Id. at p. 791.) The court again denied protection from antitrust scrutiny in *Cantor* v. *Detroit Edison Co.* (1976) 428 U.S. 579. In that case the state public utility commission approved an anticompetitive tariff requiring the defendant to provide its customers "free" light blubs. Rejecting the utility's argument that commission approval "compelled" it to operate the light bulb distribution program despite its anticompetitive effects, the court held that mere approval was insufficient to invoke state action protection because it signified only state neutrality toward the conduct in question. (Id. at p. 585.)

In the following year, the court recognized state action protection in *Bates* v. *State Bar of Arizona* (1977) 433 U.S. 350. In *Bates* the state supreme court, acting as the state's ultimate authority over the practice of law, promulgated American Bar Association-sponsored disciplinary rules banning lawyer advertising. The United States Supreme Court held that "[a]lthough the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the [State Bar] acts as the agent of the court under its continuous supervision." (Id. at p. 361.) The court concluded that the state's anticompetitive policy was "clearly and affirmatively expressed" (id. at p. 362), and that the state bar's conduct was sufficiently compelled by the state to warrant protection from antitrust scrutiny. (Id. at p. 363.)

In *New Motor Veh. Bd. of Cal.* v. *Orrin W. Fox, Co.* (1978) 439 U.S. 96, and *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.* (1980) 445 U.S. 97, the court again addressed the state action exemption as it applies to private business enterprises. In *Orrin Fox* the court held that a state-imposed scheme that restricted intrabrand competition in the sale of new automobiles was exempt from scrutiny under the antitrust laws because the program operated under "clearly articulated and affirmatively expressed" legislative guidelines. (439 U.S. at p. 109.) In *Midcal,* on the other hand, the court held that a state-imposed maximum resale price maintenance system, affecting all wine producers and wholesalers in this state, was not exempt from antitrust laws. Although the scheme was " 'clearly articulated and affirmatively expressed as state policy,' " it was not " 'actively supervised' by the State itself." (445 U.S. 105, quoting *Lafayette,* supra, 435 U.S. 389, 410 (plur. opn.).)

Most recently, in *Hoover* v. *Ronwin* (1984) ___U.S.___, 104 S.Ct. 1989, the court, on a 4-3 vote, found Arizona state bar examiners exempt from antitrust scrutiny. The majority held the examiners' actions constituted action of the sovereign itself, and hence exempt from antitrust scrutiny under *Parker* (id. at p. , 104 S.Ct. at p. 1995). Therefore, the majority found it unnecessary to consider whether the alleged anticompetitive policy was "clearly articulated" or "actively supervised." (Id. at p. ; 104 S.Ct. at pp. 1995-1996.)

The majority rejected the municipalities' contention that antitrust laws were intended to protect only against abuses by private businesses and are not applicable to municipalities that "exist to serve the public weal." (Id. at p. 403.) The court observed that the defendants were not motivated solely by desire to benefit the public. Instead, like "[e]very business enterprise" (ibid.), their decisions may be motivated by the goal of "realizing maximum benefits to [themselves] without regard to extraterritorial impact and regional efficiency." (Id. at p. 404.) A majority therefore rejected the argument that the two municipalities—both of which "act[ed] as owners and providers of services" (id. at p. 408), were immune from antitrust scrutiny.

A plurality opinion by Justice Brennan then rejected the contention that municipalities, simply by reason of their status as such, are exempt from antitrust laws. "*Parker's* limitation of the exemption . . . to 'official action directed by [the] state,' arises from the basis for the 'state action' doctrine—that given our 'dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority,' 317 U.S., at 351, a congressional purpose to subject to antitrust control the States' acts of government will not lightly be inferred. To extend that doctrine to municipalities would be inconsistent with that limitation. Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them." (435 U.S. at pp. 411-412.) Still, the plurality suggested, a municipality could come under the *Parker* exemption if it acts pursuant to state policy to displace competition with regulation or monopoly public service. Deviating slightly from the court's requirement in the private business enterprise cases that the state must have "compelled" the conduct in order for the activity to come within the *Parker* exemption (*ante*, p. *, fn. 5), the plurality stated that state direction or authorization of the anticompetitive conduct would be sufficient to trigger the exemption for municipalities. (Id. at p. 417.)[6]

[6] Four justices dissenting, led by Justice Stewart, maintained that exemption applied because "petitioners are governmental bodies, not private persons, and their actions are 'act[s] of government' which *Parker* v. *Brown* held are not subject to the Sherman Act." (435 U.S. at p. 426.)



In a concurrence, Chief Justice Burger emphasized his view that the municipalities' ownership and operation of utility companies constituted business activities pursuant to their proprietary functions (id. at p. 422-425), and hence any question of exemption should meet the more stringent "compulsion" standard applicable to private parties seeking the protection of *Parker*. The Chief Justice appeared to suggest that municipalities' nonproprietary activities should be exempt from antitrust scrutiny.

Four years later the United States Supreme Court decided *Community Communications Co.* v. *City of Boulder*, supra, 455 U.S. 40. The city, apparently acting in its regulatory capacity, placed a moratorium on expansion of plaintiff's cable television service for three months in order to allow competing companies to make bids to enter a new geographic market under a proposed model ordinance.[7] Plaintiff sued to enjoin the moratorium, claiming inter alia that it constituted a conspiracy between the city and a potential competitor, and that it restrained trade in violation of section 1 of the Sherman Act. The district court granted an injunction, rejecting the city's argument that its actions were protected as a valid exercise of its police power, or that it was exempt from antitrust scrutiny under *Parker*. A divided Tenth Circuit Court of Appeals reversed, distinguishing *Lafayette* on the ground that, in contrast to the activity in that case, "no proprietary interest of the City is here involved." (630 F.2d 704, 708.) The United States Supreme Court in turn reversed, holding over the dissent of Justice Rehnquist that the city's ordinance "cannot be exempt from antitrust scrutiny unless it constitutes the action of the State . . . itself in its sovereign capacity, see *Parker*, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, see *City of Lafayette* . . . ." (*Boulder*, supra, 455 U.S. 40, 52.) The court rejected the city's argument that merely because the state, under its home rule amendment, had vested the city with "'"*every power* theretofore possessed by the legislature . . . in

[7] Plaintiff was assignee of a 20-year, revocable, nonexclusive permit to conduct a cable television business within the city limits. (455 U.S. at p. 44.)

local and municipal affairs" ' " (id. at p. 52, emphasis in original), regulation of cable television was therefore an " 'act of government' performed by the city *acting as the state* in local matters . . . ." (Id. at p. 53, emphasis in original.) Granting of home-rule power, the court reasoned, merely indicates neutrality respecting the challenged actions, and does not satisfy the " 'clear articulation and affirmative expression' " of state policy requirement. (Id. at p. 55.) The court reiterated the *Lafayette* plurality's view that the *Parker* exemption is premised on sovereignty, and that because municipalities are not sovereign, they fall outside the exemption. (Id. at pp. 50-51.)

Accordingly, much of the parties' energy in the present case has been directed toward arguing their respective views as to whether defendants' ordinance falls within or without the *Boulder* state action exemption.[8] Consideration of *Boulder's* exemption standard at this stage in our analysis, however, is premature. Application of the state action exemption principle becomes necessary only after we determine that there is "truly a conflict between the Sherman Act and the challenged regulatory scheme." (*First American Title Co. of South Dakota* v. *South Dakota Land Title Ass'n* (8th Cir. 1983) 714 F.2d 1439, 1452; see also *Rice* v. *Norman Williams Co.*, supra, 458 U.S. 654, 662, fn. 9; *Midcal*, supra, 445 U.S. 97, 102; *Parker*, supra, 317 U.S. 341, 350; *Rice*, supra, 21 Cal.3d 431, 439-446; *Lewis-Westco & Co.* v. *Alcoholic Beverage Control Appeals Bd.* (1982) 136 Cal.App.3d 829, 834-837.)

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[8] Justice Rehnquist, writing for the dissent in *Boulder*, correctly noted that the *Parker* court cast its decision in the language of preemption. (*Parker*, supra, 317 U.S. 341, 351.) *Parker*, which was a suit to enjoin enforcement of a state statute, has been characterized by *Boulder* and *Lafayette*, however, as establishing a state action exemption from antitrust laws. (455 U.S. 40, 43; 435 U.S. 389, 394.) Unlike *Parker*, both of these latter cases were private antitrust suits for damages, not invalidation of a regulation. In the court's most recent case in this area, *Rice* v. *Norman Williams Co.* (1982) supra, 458 U.S. 654, the plaintiffs sought to enjoin enforcement of one of this state's liquor statutes. Consistently with *Parker*, the court framed its analysis in terms of preemption. In view of these cases, we agree with plaintiffs and amici that the question in the present appeal is whether defendants' regulation conflicts with, and hence is preempted by, the Sherman Act.



**B. Facial Validity of the Ordinance Under Section 1 of the Sherman Act**

Plaintiffs contend that the ordinance, on its face, conflicts with, and hence is preempted by, section 1 of the Sherman Act. (See *ante*, fn. 8.) That section states: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." (15 U.S.C. § 1.)

Defendants and amici broadly respond that no provision of the Act was intended to apply to city ordinances designed to protect or further local health, safety, or general welfare, and hence the ordinance in question cannot violate the antitrust laws. They suggest that only local legislation designed to achieve commercial or proprietary interests—either from city ownership of property or through fees or taxes pursuant to franchise awards—are properly subject to antitrust scrutiny.

Although defendants' view has rational appeal, we are bound by the United States Supreme Court's implicit rejection of that theory in *Lafayette* and *Boulder*. In both of those cases the court addressed the applicability of state action exemption to municipal defendants. However, in order to reach the question of exemption from antitrust laws, in both decisions the court necessarily assumed that each case presented a violation of antitrust laws. (E.g., *First American Title Co.*, supra, 714 F.2d 1439, 1451-1452.) While standing alone, *Lafayette* could be read to support defendants' view that only the commercial activities of municipalities are subject to antitrust scrutiny (*Lafayette*, 435 U.S. 389, 418-426, Burger, C.J., conc.), we must conclude that *Boulder* forecloses any argument that the Act does not apply to a municipality's "noncommercial" activities. The alleged anticompetitive activity in that case concerned merely the imposition of a three-month moratorium on expansion of petitioner's cable television franchise while the city studied the need for increased regulation. Whereas the facts of *Boulder* strongly suggest that the moratorium was imposed pursuant to the city's regulatory authority, still the court's resolution of the state action exemption issue necessarily assumed an antitrust violation; moreover, the court did not even

mention the possibility of a broader, preliminary exemption from antitrust scrutiny for "nonproprietary" municipal activity.[9]

Therefore, we must conclude that the United States Supreme Court necessarily and implicitly rejected defendants' view in *Boulder.* (McMahon, *Recent Significant Developments in "State Action" and Noerr-Pennington Exemptions: From Boulder to the "Sham" Exception* (1983) Toledo L.Rev. 531, 540-541.) As we shall explain below, however, defendants are correct when they assert that the antitrust laws are aimed chiefly at commercial activities. And, as demonstrated below, this fact must influence the question of how, and to what extent, traditional antitrust rules apply to municipal defendants.

We turn now to plaintiffs' claim under section 1 of the Sherman Act. To prove a facial conflict with section 1 in the present case, plaintiffs must establish as a matter of law (a) that two or more "persons" acted in concert, (b) that the activities complained of affect interstate commerce, and (c) that the action constitutes an unreasonable restraint on commerce.[10] A court may invalidate an ordinance in the abstract "only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." *(Rice* v. *Norman Williams Co.,* supra, 458 U.S. 654, 661.)

[9] In this regard, we must also reject defendants' attempt to distinguish *Boulder* on the ground that the city in that case stood to acquire revenues from its franchise awards. Again, it must be noted that the challenged activity in *Boulder* concerned not collection of franchise fees, but merely the city's imposition, under its regulatory powers, of a three-month moratorium on expansion of petitioner's franchise. Nowere in the court's majority, concurring, or dissenting opinions is it even suggested that resolution of the case rested on defendants' "revenue generating" theory. If in fact the United States Supreme Court had found that city's apparent interest in collecting fees for its franchise awards to be determinative, we believe that court would have said so somewhere in its opinion.

[10] Plaintiffs and amici argue that a local enactment is preempted by federal law not only when its operation would bring it expressly within the federal statute, but also whenever its operation would frustrate the broad objectives that underlie federal legislation. (See *Hines* v. *Davidowitz* (1941) 312 U.S. 52, 67 (the test of preemption is whether the state law stands "as an obstacle to the accomplishment . . . of the full purposes and objectives of Congress").) See generally, Posner, *The Proper Relationship Between State*

*(Footnotes continued on following page)*



Both parties vigorously contest whether in this case plaintiffs can or cannot prove the requisite concerted action and effect on interstate commerce. Although we do not agree with plaintiffs' suggestion that these "technical" requirements should be ignored in a facial attack seeking "mere invalidation" instead of damages *(ante,* fn. 10), we need not address these issues now[11] because we have determined that, in any event, plaintiffs cannot prove that the ordinance on its face mandates an unreasonable restraint of trade and hence irreconciliably conflicts with section 1 of the Sherman Act. (458 U.S. at p. 661.)[12]

1. Unreasonable Restraint

*a. Application of Traditional Antitrust Law to Municipal Defendants.* We recognize at the onset that this case forces us to wander off the map and travel cross country without the benefit of trail or compass. Although *Boulder* clearly held municipalities subject to antitrust laws, the court specifically declined to address the issue of the applicability of traditional antitrust rules or standards against which municipal defendants are to be judged. *(Boulder,* supra, 455 U.S. 40, 56, fn. 20.) Significantly, however, the *Boulder* court strongly suggested

*(Footnotes continued from preceding page)*

*Regulation and the Federal Antitrust Laws* (1974) 49 N.Y.U.L.Rev. 693, 698-703 (suggesting that the federal policy of free and open competition can be applied to prevent the operation of state law that clearly transgresses the "spirit of the Sherman Act," "even if the conflict is not within the express language of the federal statute"). We are not convinced that such a broad view is warranted or that the United States Supreme Court has embraced it. Indeed, the court has recently indicated that it will not follow plaintiffs' approach: the court stated that "[a] state statute is not pre-empted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect" (*Rice* v. *Norman Williams Co.,* supra, 458 U.S. 654, 659) and suggested that it will invalidate state legislation in the abstract "only if it mandates . . . a *violation* of the antitrust laws in all cases . . . ." (Id. at p. 661, emphasis added.) Because it is necessary to prove the requisite concerted action and interstate commerce elements in order to prove a violation of section 1, the court's statement must reasonably be construed to require proof of those elements even in a facial attack such as this.

[11] It is therefore unnecessary to discuss either the "intraenterprise" or the *Noerr/Pennington* issues raised in the briefs.

[12] Compare, Comment, *Sherman Act "Jurisdiction" in Hospital Staff Exclusion Cases* (1983) 132 U.Pa.L.Rev. 121, 142.

that municipalities and private business enterprises may be subject to different standards: the court repeated *Lafayette's* suggestion that " '[i]t may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government.' " (Ibid., citing *Lafayette,* supra, 435 U.S. 389, 417, fn. 48.) Similarly, the *Boulder* dissent observed that under the majority's rule, the courts "must now adapt antitrust principles to adjudicate Sherman Act challenges to local regulation of the economy." (455 U.S. at p. 65.) Anticompetitive conduct by a municipality in exercise of its legitimate police power is indeed of a "different complexion" than similar conduct engaged in by private business enterprises and therefore, as the *Boulder* court suggested, courts must adapt or modify the application of traditional antitrust rules when reviewing the acts of municipal defendants.

The United States Supreme Court has often noted that the purpose of antitrust law is the regulation of anticompetitive business practices. The Sherman Act relates to " 'business competition' " (*Apex Hosiery Co.* v. *Leader* (1940) 310 U.S. 469, 493, fn. 15) and is designed to regulate "combinations of business and capital organized to suppress commercial competition . . . ." (*United States* v. *SouthEastern Underwriters Ass'n* (1944) 322 U.S. 533, 553; see also *Parker,* supra, 317 U.S. 341, 351; 1 Kintner, Federal Antitrust Law (1980) § 4.18 [summarizing an exhaustive analysis of the legislative history of the Act]; cf. Bork, *Legislative Intent and the Policy of the Sherman Act* (1966) 9 J.L. & Econ. 7.) One commentator has observed that "[t]he Court has been reluctant to apply antitrust laws to the conduct of those who are not engaged in commercial activities." (Vanderstar, *Liability of Municipalities Under the Antitrust Laws: Litigation Strategies* (1983) 32 Cath.U.L. Rev. 395, 397-398.) Indeed, the court has said that the Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." (*Klor's, Inc.* v. *Broadway-Hale Stores, Inc.* (1959) 359 U.S. 207, 213, fn. 7.) Similarly, the court noted in *Goldfarb,* supra, that it would be "unrealistic" to



"automatically . . . apply to the professions antitrust concepts which originated in other areas." (421 U.S. 773, 788, fn. 17.)

Traditional antitrust rules have been fashioned over the years in the context of private business regulation. Many of the rules are premised implicitly, sometimes explicitly, on assumptions about how rational business competitors behave in their quest for greater profit. Municipal governments, on the other hand, most often act on the basis of different motives. Unlike a private business, a municipal government's decision to displace competition is generally motivated by the purpose of furthering local health, safety or welfare. When acting in its regulatory capacity, a local government is both authorized to act in accordance with, and entrusted with the duty of serving, the public weal. Just as courts should proceed cautiously lest they might unnecessarily interfere with rights of local self-governance (Frug, *The City as a Legal Concept* (1980) 93 Harv.L.Rev. 1059; Cirace, *An Economic Analysis of the "State-Municipal Action" Antitrust Cases* (1982) 61 Tex.L.Rev. 481, 490, fn. 50, 514; 1 DeTocqueville, *Democracy in America* (Mayer ed., Lawrence trans. 1969) pp. 90-91 and *passim*), so too courts must be attentive and sensitive to the legitimate motives behind municipal regulations. Therefore, contrary to the urging of plaintiffs and amici, we will not mechanically apply to municipalities rules of law fashioned exclusively in the different context of private business regulation. Such standards will no doubt be helpful in formulating rules for the application of antitrust principles to municipalities, but if unbending application of traditional standards would prove too inflexible to accommodate legitimate governmental objectives that motivate municipal regulation, we will not hesitate to cautiously depart from traditional rules. (Shenefield, *The Parker v. Brown State Action Doctrine and the New Federalism of Antitrust* (1983) 51 Antitrust L.J. 337, 346; Note, *The Application of Antitrust Laws to Municipal Activities* (1979) 79 Colum.L.Rev. 518, 539-543; Note, *Home Rule and the Sherman Act After Boulder: Cities Between a Rock and a Hard Place* (1983) 49 Brooklyn L.Rev. 259, 291-297 [hereinafter cited *Home Rule*]; *The Supreme Court, 1981 Term* (1982) 96 Harv.L.Rev. 268, 272-276.)[13]

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[13] See also authorities cited *post,* page *, footnote 24.

* Typed opinion page 43.

*b. The Two Traditional Standards: The Rule of Reason, and the Rule of Per Se Illegality.* Although the prohibition in section 1 of "[e]very contract, combination . . . or conspiracy, in restraint of trade" was at first applied literally to invalidate *all* such restraints (e.g., *United States* v. *Trans-Missouri Freight Ass'n* (1897) 166 U.S. 290, 328 ["the plain and ordinary meaning of . . . [section 1] is not limited to that kind of contract alone which is an unreasonable restraint of trade, but all contracts are included . . ." within the section's proscription]), the court soon retreated from this manichean view of the Act, holding it was not intended to strike down restraints merely ancillary or incidental to another legitimate purpose. (*United States* v. *Addyston Pipe & Steel Co.* (6th Cir. 1898) 85 F. 271, 282, mod. and affd. *sub nom. Addyston Pipe & Steel Co.* v. *United States* (1899) 175 U.S. 211, 244.) In *Standard Oil Co.* v. *United States* (1911) 221 U.S. 1, the court announced that the Act "evidenced the intent not to restrain the right to make and enforce contracts . . . which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods . . . which would constitute an interference that is an undue restraint." (Id. at p. 60; see also *United States* v. *American Tobacco Co.* (1911) 221 U.S. 106, 179 ["restraint of trade" covers only those acts that "injuriously restrain[ ] trade"].) Today, under what has become termed the "rule of reason," many restraints are analyzed in light of their economic effects on market conditions, and may be upheld if "reasonable," i.e., if the restraint "merely regulates and perhaps thereby promotes competition" instead of suppressing or destroying competition. (*Chicago Bd. of Trade* v. *United States* (1918) 246 U.S. 231, 238.)

Some types of restraints, however, were never given such accomodating review. Cartels—agreements among producers to set prices above the competitive level by lowering production—were early declared illegal "per se," and the courts refused to consider arguments that prices set by a cartel were "reasonable." (Note, *Fixing the Price Fixing Confusion: A Rule of Reason Approach* (1983) 92 Yale L.J. 706, 710-712 [hereinafter *Price Fixing Confusion*].) Whereas these cases focused on cartel behavior (e.g., *United States* v. *Trenton*



*Potteries Co.* (1927) 273 U.S. 392; see *Price Fixing Confusion*, supra, at p. 712, fn. 38; Comment, *The Per Se Illegality of Price-Fixing—Sans Power, Purpose, or Effect* (1952) 19 U.Chi.L.Rev. 837, 855) and refused to consider economic reasonableness on the assumption that cartels were themselves evils to be eradicated (e.g., Bork, supra, 9 J.L. & Econ. at p.11), the United States Supreme Court in 1940 significantly expanded the universe of price-related agreements subject to an irrebuttable presumption of illegality. In *United States* v. *Socony-Vacuum Oil Co.* (1940) 310 U.S. 150, the court, through Justice Douglas, inferred the existence of a cartel from the defendants' agreement to buy surplus oil. *Socony*, however, focused on price fixing itself rather than the inferred cartel; the court stated that whether the parties actually could or did succeed in fixing prices was irrelevant, and broadly characterized the proscribed conduct of price fixing: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal *per se* . . . . [¶] [T]he machinery employed . . . is immaterial." (Id. at p. 223.) "Any combination which tampers with price structures is engaged in an unlawful activity." (Id. at p.221.)

The focus of attention since *Socony* has been on whether defendants have in any way agreed on a course of conduct affecting prices: if the label "price fixing" is found to fit the conduct in question,[14] the courts have mechanically declared such conduct illegal "even though no invidious purpose or harmful economic consequences have been established, and even though the economic results of the conduct may be of net benefit to consumers." (*Price Fixing Confusion*, supra, 92 Yale L.J. at p. 714; see *Arizona* v. *Maricopa County Medical Soc'y*

[14] The court has at times declined to treat as illegal per se, conduct seemingly within *Socony's* broad price-fixing definition. (E.g., *Broadcast Music, Inc.* v. *Columbia Broadcasting Sys., Inc.* (1979) 441 U.S. 1, 20 [blanket licenses not illegal per se even though music associations "fixed" license prices, because such licenses created a market efficiency, i.e., a product different from individually licensed compositions].) It has been suggested that " 'price fixing' is no more than a label given to arrangements that have been found unlawful per se." (Easterbrook, *Maximum Price Fixing* (1981) 48 U.Chi.L.Rev. 886, 887.)

(1982) 457 U.S. 332 [member physicians' "foundations" to set maximum fees charged to insurance plan patients illegal per se price fixing].) The per se rule reflects an irrebuttalbe presumption that, if the court were to subject the conduct in question to a full-blown inquiry, a violation would be found under the traditional rule of reason. (Id. at p. 344; *Northern Pac. Ry.* v. *United States* (1958) 356 U.S. 1, 5.)

Although the price-fixing illegal per se rule has its adherents, and is asserted to be economically reliable and administratively efficient,[15] it has also suffered steady and growing criticism as an often arbitrary, mechanical, and inconsistently applied rule that ignores the realities of market power and net economic effects.[16] Of course, we are not here concerned with the wisdom or efficacy of the per se rule as it applies to price fixing in the typical case against private business defendants.

[15] E.g., Kaysen & Turner, Antitrust Policy: An Economic and Legal Analysis (1959) page 142 (rule is relatively clear, self-enforcing, and administratively efficient); Scherer, Industrial Market Structure and Economic Performance (2d ed. 1980) page 510 (abandoning the rule would lead to uncertainty, complex litigation, and undue burdens on courts and administrative agencies); Redlich, *The Burger Court and the Per Se Rule* (1979) 44 Alb.L.Rev. 1 (rule protects competitors' right to make independent judgments regarding price); Rahl, *Price Compeition and the Price Fixing Rule—Preface and Perspective* (1962) 57 Nw.U.L.Rev. 137 (rule provides a clear guide for business conduct and a simplified approach to resolving cases); Adams, *The "Rule of Reason": Workable Compeition or Workable Monopoly?* (1954) 63 Yale L.J. 348 (criticizing attacks on the rule) Note, (1983) 57 Tulane L.Rev. 994 (*Maricopa* properly reaffirmed the per se illegality of price fixing agreements).

[16] E.g., Easterbrook, *Maximum Price Fixing* (1981) U.Chi.L.Rev. 886 (maximum price fixing is almost always beneficial to consumers, and hence should not be subject to per se analysis); Elman, *"Petrified Opinions" and Competitive Realities* (1966) 66 Colum.L.Rev. 625 (per se rule should not be mechanically applied to vertical maximum resale price agreements); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division pt. II* (1965) 75 Yale L.J. 373 (use of per se rules outside context of horizontal price-fixing agreements destroys efficiency and misallocates resources); von Kalinowski, *The Per Se Doctrine—An Emerging Philosophy of Antitrust Law* (1964) 11 UCLA L. Rev. 569 (cautioning against mechanical application and adoption of per se rules); Director & Levi, *Law and the Future: Trade Regulation* (1956) 51 Nw.U.L.Rev. 281 (suggesting that price fixing should not be condemned as illegal per se unless it affects the market); Jaffe & Tobriner, *The Legality of Price-Fixing Agreements* (1932) 45 Harv.L.Rev. 1164 (proposing abolition of the "arbitrary" per se rule against price fixing, in favor of the rule of reason); *Price Fixing Confusion*, supra, 92 Yale L.J. at p. 714, & *passim*.



Nevertheless, we question whether the rule should be extended to cover the municipal defendants in this case. Therefore, although plaintiffs urge us to declare the ordinance facially invalid because it represents blatant, albeit government-imposed, vertical and horizontal[17] fixing of maximum prices, we must first pause to consider whether these municipal defendants should be subject to the per se rule, the rule of reason, or a more accommodating standard.

*c. Purpose and Applicability of the Per Se Rule Against Price Fixing.* Of course, "it is . . . improper to dispose of an antitrust case by invoking a per se rule unless the challenged practice really fits the policy and rationale of the rule." (Elman, *"Petrified Opinions" and Competitive Realities* (1966) 66 Colum.L.Rev. 625, 627; cf., *Boulder,* supra, 455 U.S. 40, 65, Rehnquist, J., dis. [questioning whether per se rules of illegality will apply to municipal defendants in the same manner as they apply to private business defendants].) Because we determine below that the two principal justifications for the rule's application to private business enterprises—economic reliability and ease of administration[18]—are not implicated in the situation before us, we must conclude that the per se rule has no place in this case.

*(i) Economic Reliability*

The per se rule is thought to be economically reliable because, the courts assume, price fixing almost always has anticompetitive effects and almost never has procompetitive effects or "redeeming virtue." Although it is unquestionable that the United States Supreme Court has long viewed price fixing by private business enterprises as illegal per se (e.g., *Monsanto Co.* v. *Spray-Rite Service Corp.* (1984) ____ U.S. ____, ____, 104 S.Ct. 1464, 1469), we note that the court has never addressed the question whether the same rule applies to the same conduct by municipalities. Moreover, just as the Supreme Court in the past has declined to apply the per se rule

[17] Plaintiffs assert that the ordinance creates a coercive vertical combination between the Board and individual landlords and furthermore that it creates a horizontal combination among all covered landlords.

[18] *Maricopa*, supra, 457 U.S. at pages 343-354.

in circumstances that pose previously unaddressed questions of economic effect (cf. *White Motor Co.* v. *United States* (1963) 372 U.S. 253, 261 [refusing to apply a new per se rule]; but see, *Maricopa,* supra, 457 U.S. 332, 349 [applying an established per se rule to a "new" industry]), we too are reluctant to announce at this early stage, and without the benefit of any evidence regarding the economic consequences of locally imposed rent controls, that price fixing implemented by a local government necessarily produces negative net anticompetitive effects or that it lacks "any redeeming virtue." (*Continental T.V., Inc.* v. *GTE Sylvania Inc.* (1977) 433 U.S. 36, 50; see *post,* p. ,* fn. 20.)

The court's conclusion that price fixing by private business defendants is "invariably anticompetitive," is based on a fear that even if prices are reasonable when set, by sanctioning such behavior the courts would facilitate fixing of unreasonable prices in the future. (*Socony,* supra, 310 U.S. 150, 221; *Trenton Potteries,* supra, 273 U.S. 392, 397.) In the context of price fixing by a cartel, the *Trenton Potteries* court observed that "[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed." (273 U.S. 392, 397.) The *Socony* court echoed this concern, noting that "[t]hose who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system." (310 U.S. 150, 221.)

The court's fear of facilitating such "predatory" activity is grounded on assumptions about how unrestrained business competitors will act if given the opportunity. These assumptions have no place in the present case, however. There is

* *Infra* A-25.



nothing to suggest that the named defendants are acting for their own selfish purposes with a view toward securing market control and hence price control in the future. Quite the contrary, defendants' sole and only legitimate purpose is to serve the public welfare as described in section 3 of the ordinance. When that purpose no longer exists—i.e., when annual average citywide rental vacancies exceed 5 percent over a six-month period—the ordinance provides for lifting of rent controls until the vacancy rate again falls below 5 percent. (§ 6, subd.(q).) We therefore conclude that neither the presumption that price fixing is invariably anticompetitive, nor the fear of facilitating "predatory" practices—both concerns that have been expressed by the United States Supreme Court in the context of analyzing the conduct of private business defendants—justifies application of the per se rule to municipalities acting in their legitimate governmental capacities.

*(ii) Ease of Administration*

The per se rule is also said to be justified by its ease of judicial administration. Both the *Trenton Potteries* and the *Socony* courts further explained refusal to inquire into the reasonableness of set prices on the ground that such a review would necessitate constant detailed supervision and analysis by the government to assure that reasonable prices remain reasonable as economic conditions vary. (273 U.S. 392, 397-398; 310 U.S. 150, 221.)[19] Recently, the *Maricopa* court stated that the high costs associated with "elaborate inquiry into . . . reasonableness" was a major justification for analyzing maximum price fixing in the health care industry under the per se rule. (457 U.S. 332, 343-344.)

Certainly, the judicial task is easier when the question is changed from "does the conduct unreasonably restrain competition" to "have defendants engaged in price fixing." Resort to this rule of administrative convenience, however, can be justified only if the costs "of formulating the rule, and of the overinclusiveness that inevitably accompanies it—are less than

[19] Likewise, it has long been recognized that courts are poorly suited to judge the reasonableness of prices set by businesses. (*United States* v. *Trans-Missouri Freight Ass'n* (1897) 166 U.S. 290, 331-332.)

the attendant savings in administrative costs." (*Price Fixing Confusion,* supra, 92 Yale L.J. at p. 709; see also *United States* v. *Container Corp. of America* (1969) 393 U.S. 333, 341 (Marshall, J., dis.); Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking* (1974) 3 J. Legal Stud. 257, 264-273; Easterbrook, *Maximum Price Fixing* (1981) 48 U.Chi.L.Rev. 886, 909-910; Bohling, *A Simplified Rule of Reason for Vertical Restraints: Integrating Social Goals, Economic Analysis, and Sylvania* (1979) 64 Iowa L.Rev. 461, 490-491.)

The potential for overinclusiveness in the present case is apparent. Whereas the United States Supreme Court in *Trenton Potteries* and *Socony* based its refusal to consider whether private business defendants had set reasonable prices largely on the absence of administrative supervision and on the impracticality of constant judicial review of such prices, the present case presents a different situation. By express provision of the ordinance, it is the Board's duty constantly to review and, if necessary, to adjust rents in order to assure each landlord a "fair return on his investment." On the face of the ordinance, rents would "be subject to continuous administrative supervision and readjustment in light of changed conditions" (*Socony,* supra, 310 U.S. 150, 221) without requiring any involvement by the courts unless a landlord chooses to exercise his right to appeal his individual adjustment. Moreover, costs of administering the program are borne by the local agency: the ordinance is designed to allow the Board efficiently to address and resolve adjustment disputes and to be financially self-supporting.

We therefore must conclude that application of the "ease of administration" justification for the per se rule would, in the present case, improperly remove from judicial scrutiny an elaborate government-enforced maximum price control and adjustment scheme not contemplated by the court's previous cases dealing with private business defendants. (See Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws* (1974) 49 N.Y.U.L.Rev. 693, 706.) We cannot say that probable economic harm, together with social costs resulting from absence of a per se rule, outweighs the risk of condemning, without any detailed inquiry, a local



government's heretofore presumed legitimate exercise of its police powers. (Cf. Bohling, supra, 64 Iowa L.Rev. at p. 491.) In our view, maximum rents price fixing, implemented by local government, is simply not of the same character as price fixing among private business defendants.[20]

Because we find neither the economic reliability justification nor the ease of administration justification applicable to municipal defendants' alleged anticompetitive behavior, we decline to subject these defendants to analysis under the per se

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[20] Surely, the ordinance at issue here is not a naked restraint of trade with no purpose except stifling of competition. (See Note, *Crawling out From Under Boulder* (1984) 34 Case Western Res. L.Rev. 303, 332-333.) In this regard, the dissent recognizes that per se rules are inapplicable if the challenged restraint has "any redeeming virtue" (*post,* p._____;* *Continental T. V. Inc.* v. *GTE Sylvania Inc.* (1977) 433 U.S. 36, 50, quoting *Northern Pacific,* supra, 356 U.S. at p. 5), but proceeds to ignore this established test, in favor of its own subjective inquiry into whether the ordinance's anticompetitive effects "override" its redeeming virtue. This unprecedented modification of *Northern Pacific-Sylvania* renders the dissent's analysis internally contradictory: at the same time the dissent recognizes the impropriety of balancing local policy against antitrust policy (*post,* p._____**), it plunges head-on to do just that by balancing a local policy's redeeming virtue against its anticompetitive effects. (*Post,* p._____***) Thus—through the thinly veiled guise of its revised standard of review—the dissent would engage in the same *Lochner*-type analysis that it purposrts to disclaim, in order to accomplish the desired result: judicial veto of local economic regulation deemed to be unwise. (Indeed, one need look no further that the titles of the dissent's authorities to see that this is the ultimate objective.)

Furthermore, even if the dissent might somehow be read to avoid such balancing, its analysis would be plainly circular. In order to determine that the per se rule of illegality of price fixing—itself a presumption—applies here, the dissent would apparently create a foundational presumption that municipal price fixing lacks "any redeeming virtue"; in other words, according to the dissent, municipal price fixing is per se illegal because it is per se meritless. This effectively guts the *Northern Pacific-Sylvania* holdings that presence of "redeeming virtue" renders per se analysis inapplicable. Finally, the dissent's suggestion that failure to apply a per se rule would somehow violate federal policy is curious at best. The Sherman Act says nothing of per se rules. The per se rule is a procedural device created by the federal courts largely for their administrative convenience; it is not a substantive rule of law. (*Northern Pacific,* supra, 356 U.S. at p. 5; *Maricopa,* supra, 457 U.S. at p. 344.) A state court violates no federal policy by declining to extend per se analysis to an unprecedented attack on municipal regulation.

* Dissenting opinion *infra* A-83.
** Dissenting opinion *infra* A-85.
*** Dissenting opinion *infra* A-86.

rule.[21] We turn, instead, to the rule of reason. If this were a typical case in which it was determined that a per se rule did not apply to a claim of facial conflict with the Sherman Act, our inquiry would end here and the parties would be left to litigate their antitrust claims at trial under the rule of reason. (*Rice* v. *Norman Williams Co.*, supra, 458 U.S. 654, 661.) We cannot take that course in this appeal, however, because, as we conclude below, the rule of reason as presently formulated is inapplicable to review of alleged conflict between municipal regulation and the Sherman Act.

*d. Applicability of the Rule of Reason.* In *National Soc. of Professional Engineers* v. *United States* (1978) 435 U.S. 679 the court held a professional association's price maintenance scheme illegal per se. Before reaching that conclusion, however, the court reviewed the defendant's claim that its conduct was legal under the rule of reason because it was motivated by a desire to forestall decreased quality, and hence public harm, that might result if there was unrestrained competitive bidding among engineers. The court rejected the defendant's public welfare argument: "[c]ontrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." (Id. at p. 688; *Chicago Bd. of Trade*, supra, 246 U.S. 231, 238; *Standard Oil*, supra, 221 U.S. 1, 58.) The court made clear that

[21] A third possible justification for application of per se rules, closely related to the ease of administration justification, relates to predictability. This justifiction, in turn, assumes clearly defined judicial pronouncements on prohibited and permissible conduct—an assumption that has no basis with respect to the novel question of potential federal antitrust conflict with a municipality's exercise of its police powers.

For yet another reason, the per se rule is not applicable in this case. The per se rule is itself dependent on the applicability of the rule of reason. (E.g., Note, *Antitrust Standing, Antitrust Inquiry, and the Per Se Standard* (1984) 93 Yale L.J. 1309, 1311.) As noted above, the per se rule reflects an irrebuttable presumption that, if the court were to subject the conduct in question to a full-blow inquiry, a violation would be found under the traditional rule of reason. If, as we conclude below, the traditional rule of reason must be modified or rejected in order to accommodate municipal defendants, it follows that traditional per se analysis cannot be applied to those defendants. (*Home Rule*, supra, 49 Brooklyn L.Rev. at pp. 294-296.)



under the rule of reason, inquiry is limited to whether the challenged conduct promotes or suppresses competition. (435 U.S. at p. 691.) The parties will not be heard to argue, and a court may not consider, whether a policy favoring competition is in the public interest. (Id. at p. 692.)

As stated above, however, we will not mechanically apply to municipal defendants rules of law developed exclusively in the context of determining private business antitrust liability. Whereas private business is motivated chiefly by the goal of increasing profits, the only legitimate purpose for municipal action is promotion of public health, safety and welfare. If courts were to judge municipal conduct under the rule of reason as it applies to private business enterprises, i.e., solely by the effect of the restraint on competition, most municipal actions would be found to violate the law: "[c]ompetition simply does not and cannot further the interests that lie behind most social welfare legislation." (*Boulder*, supra, 455 U.S. 40, 66, Rehnquist, J., dis.) At the least, such regulations would be declared void; at worst, local governments might be subject to treble damages.[22] We cannot believe that Congress intended such results to flow from a municipality's heretofore presumed legitimate exercise of its police power.[23] (Id., at p. 67 ["If municipalities are permitted only to enact ordinances that are consistent with the procompetitive policies of the Sherman Act, a municipality's power to regulate the economy would be all but destroyed."]; Vanderstar, supra, 32 Cath.U.L.Rev. at pp. 397-400; Handler, *The Current Attack on the Parker* v. *Brown State Action Doctrine* (1976) 76 Colum.L.Rev. 2, 15; Hovenkamp, *Tying Arrangements in the Real Estate Market: Federal Antitrust Law and Local Land Development Policy* (1981) 33 Hastings L.J. 325, 335.)

[22] See *Boulder*, supra, 455 U.S. 40, 56, footnote 20 ("we do not confront the issue of remedies appropriate against municipal officials") (but see Rehnquist, J., dis. at p. 65, fn. 2); *Lafayette*, supra, 435 U.S. 389, 401-402 (same); Areeda, Antitrust Law (Supp. 1982) par. 212.2b; *Home Rule*, supra, 49 Brooklyn L.Rev. at pages 297-299; Comment, *Antitrust Trebel Damages as Applied to Local Government Entities: Does the Punishment Fit the Defendent?* 1980 Ariz.St.L.J. 411.

[23] See *Birkenfeld*, supra, 17 Cal.3d 129, 153-164.

To prevent unwarranted interference with a municipal government's legitimate exercise of its police power, and to accommodate for the motives that underlie local government regulation (cf. e.g., Elzinga, *The Goals of Antitrust Law: Other Than Competition and Efficiency, What Else Counts?* (1977) 125 U.Pa.L.Rev. 1191), courts must develop tests that recognize a public welfare "defense" to alleged violation of the antitrust laws by municipalities. (*Boulder,* supra, 455 U.S. at pp. 66-67, Rehnquist, J., dis.; *Home Rule,* supra, 49 Brooklyn L.Rev. at pp. 294-295; Note, *The Application of Antitrust Laws to Municipal Activities* (1982) 96 Harv.L.Rev. 268, 275.)[24]

*e. Facial Validity of the Ordinance Under a Modified Standard.* We do not mean to suggest that rejection of the traditional rule of reason test in this case harkens return to "the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation" reminiscent of *Lochner* v. *New York* (1905) 198 U.S. 45. (*Boulder,* supra, 455 U.S. at p. 67, Rehnquist, J., dis.) Whereas the primary evil of the *Lochner* approach was an overly strict emphasis on the ends-means nexus that in turn allowed judges wide latitude to impose their own standards of reasonableness on economic and social legislation, such jurisprudence has no place in our

[24] See also McMahon, supra, 14 Toledo L.Rev. at pp. 544-545; James, *Municipal Defenses to Antitrust Liability* (1983) 6 U.Ark. Little Rock L.J. 273, 290-296; Klitzke, *Antitrust Liability of Municipal Corporations: The Per Se Rule* vs. *The Rule of Reason—A Reasonable Compromise* 1980 Ariz. St. L.J. 253, 265-273; Freilich et al., *Antitrust Liability and Preemption of Authority: Trends and Developments in Urban, State and Local Government Law* (1983) 15 Urban Law. 705, 711-713; Brame & Feller, *The Immunity of Local Governments and Their Officials From Antitrust Claims After City of Boulder* (1982) 16 U. Richmond L.Rev. 705, 715-717; Comment, *Community Communications Co.* v. *City of Boulder: Denial of Parker Exemption to Home Rule Cities* 1983 Utah L.Rev. 139, 159-160; Comment, *Affiliated Capital Corp.* v. *City of Houston: Local Governments and Antitrust Immunity* (1983) 35 Baylor L. Rev. 791, 816-818; cf. Levin, *The Antitrust Challenge to Local Government Protection of the Central Business District* (1983) 55 U.Col.L.Rev. 21, 64-79; Note, *Post Lafayette Municipal Liability for Refusing to Zone Outlying Development* (1981) 59 Wash.U.L.Q. 485, 509-510; Chu, *Antitrust Liability for Municipal Airport Operations: Will It Fly?* (1983) 49 J. Air L. & Commerce 245, 280-282; Marticorena, *Municipal Cable Television Regulation: Is There Life After Boulder?* (1982) 9 Western St.U.L.Rev. 113, 166-167.



analysis of a municipal regulation's potential conflict with the antitrust laws.[25]

In articulating an appropriate test by which to review municipal actions alleged to conflict with the federal antitrust laws, we seek on the one hand a test that is sufficiently flexible to accommodate the interest of local government in promoting public health, safety and welfare programs or regulations. At the same time, we favor a standard that is not toothless; mere incantation of a purpose to promote the public welfare should not insulate municipal regulations from invalidiation under the supremacy clause. Local governments should not be judged under a standard that will guarantee validity even for improperly motivated or implemented[26] anticompetitive municipal regulations or commercial enterprises that plainly undermine the objectives of the federal antitrust laws.

[25] For the same reason we decline to analyze municipal conduct under a so-called "municipal rule of reason." (See, e.g., James, supra, 6 U.Ark. Little Rock L.J. at pp. 296-296 [proposing such an approach]; Comment, supra, 35 Baylor L.Rev. at pp. 816-818 [same].) Whereas the rule of reason as presently formulated focuses solely on the policy of promoting competition (*Professional Engineers,* supra), recognition of a municipal public policy "defense" within the framework of the rule of reason would drastically alter the nature of a court's rule of reason inquiry: a court would apparently be called on to balance the "amount" of anticompetitive restraint against a municipality's interest in effectuating a desired local purpose. If the rule of reason were so modified, it would be no more than a means for judges to impose their own policy judgments on municipal actions. (See *Boulder,* 455 U.S. at pp. 67-68, Rehnquist, J., dis.; Civiletti, *The Fallout from Community Communications Co.* v. *City of Boulder: Prospects for a Legislative Solution* (1983) 32 Cath. U.L.Rev. 379, 386-337; Comment, *Alternative Approaches to Municipal Antitrust Liability* (1982) 11 Fordham Urban L.J. 51, 81-82; cf. Marticorena, supra, 9 Western St. U.L.Rev. at pp. 166-167.) We therefore reject a modified rule of reason; instead, we adopt a test that prevents judicial second-guessing of local decisions to accomplish proper local purposes. (see *post,* p. _____*, fn. 28.)

* *Infra* A-31.

[26] Certainly, official misconduct or conflict of interest should not be immune from condemnation under the antitrust laws. See Note, supra, 79 Colum.L.Rev. at page 538; compare, Cirace, supra, 61 Tex.L.Rev. at page 498 (arguing that municipalities should be exempt from antitrust scrutiny if (a) displacement of competition is no broader than the scope of the substantial market failure, imperfection, or instability at which it is directed, and (b) implementation involves no official misconduct, discrimination, or conflict of interest).

We turn for initial guidance to the United States Supreme Court's commerce clause cases. State or local regulation will be upheld against commerce clause attack if the regulation (1) does not discriminate against interstate commerce and (2) bears a rational relationship to a legitimate local purpose. In addition, the extent to which the court will permit burdens on interstate commerce depends on (3) the nature of the local interest, and whether it could be promoted with a lesser impact on interstate activities. Once these elements are satisfied, the court applies a balancing test: a regulation will be upheld unless its incidental burdens on interstate commerce are clearly excessive in relation to the putative local benefits. (E.g., *Edgar* v. *MITE Corp.* (1982) 457 U.S. 624, 643-646 [striking down state business takeover act]; *Kassel* v. *Consolidated Freightways Corp.* (1981) 450 U.S. 662, 671-679 [striking down state truck length statute]; *Minnesota* v. *Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 471-474 [upholding state law banning plastic and nonreturnable milk containers]; *Hughes* v. *Oklahoma* (1979) 441 U.S. 322, 336-338 [striking down state regulation of minnow trade]; *Pike* v. *Bruce Church, Inc.* (1970) 397 U.S. 137, 142 [striking down state law on packaging of cantalopes]; *Dean Milk Co.* v. *City of Madison* (1951) 340 U.S. 349, 353-356 [striking down local milk regulation].)

With appropriate modifications, we believe that a test modeled after the court's commerce clause cases will provide a workable standard for judging alleged conflict between municipal ordinances and the federal antitrust laws. We will, however, depart from the United States Supreme Court's commerce clause test in one significant respect. We will not apply the wide-ranging, essentially standardless cost-benefit analysis employed in the court's recent "balancing" decisions. (See, e.g., *MITE Corp.*, supra, 457 U.S. 624; *Kassel*, supra, 450 U.S. 662; *Clover Leaf Creamery*, supra, 449 U.S. 456; see generally, Eule, *Laying the Dormant Commerce Clause to Rest* (1982) 91 Yale L.J. 425 [criticizing the court's balancing approach, and proposing an alternate standard]; Maltz, *How Much Regulation is too Much—An Examination of Commerce Clause Jurisprudence* (1981) 50 Geo.Wash.L.Rev. 47 [same]; Tushnet, *Rethinking the Dormant Commerce Clause* 1979 Wis.L.Rev. 125 [same].) Balancing a municipality's need for particular local health, safety and welfare regulations or programs against often incommensurable alleged anticompetitive effects is a task for which courts are not well suited. On the other hand, a standard applicable to municipalities must be capable of considering those economic efficiency factors that underlie federal antitrust policy.



Adapting the court's commerce clause test to this facial section 1 attack on a municipal rent control ordinance, we conclude that if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power,[27] and operates in an even handed manner, it must be upheld against a claim that it conflicts with section 1 of the Sherman Act unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies.[28]

Applying this test to the present case, we first observe that our decision in *Birkenfeld* forecloses any suggestion that the

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[27] This formulation would not rest determination of permissible anticompetitive municipal conduct on findings that the local government engaged in "traditional," or "integral" functions, nor would an ordinance's validity turn on the distinction between "governmental" as opposed to "proprietary" activities. Framing permissible conduct in terms of a municipality's exercise of its legitimate police powers, on the other hand, encompasses all local actions rationally related to promotion of local health, safety and welfare. (*Home Rule*, supra, 49 Brooklyn L.Rev. at p. 294, fn. 191.)

[28] We recognize that this standard calls on courts to make difficult determinations as to whether proposed alternative means of accomplishing a legitimate local purpose would do so (1) as effectively as the challenged means and (2) through means that intrude less on the policies of the federal antitrust laws. Regardless the difficulty of these determinations, however, this standard is preferable to a so-called "municipal rule of reason," because it would not require a court to balance competing—and often incommensurable—policies. (See *ante*, p. _____*, fn. 25.) Instead, the standard we embrace today prevents judicial second-guessing of legitimate local purposes. However, although a court may not invalidate local legislation by balancing the propriety of (or need for) a legitimate local purpose against federal antitrust policies, a court may invalidate a municipality's means of achieving a local policy if the local goal is sought to be advanced through discriminatory or irrational means, or if it could be achieved as effectively by means that can be demonstrated to likely intrude less on federal antitrust policies.

* *Infra* A-29.

regulation is not supported by a legitimate purpose. There are no allegations of conflict of interest or illegal collusion in the enactment or drafting of the ordinance. Moreover, "[i]t has long been settled that [municipal police] power extends to objectives in furtherance of the public peace, safety, morals, health and welfare and 'is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life.'" (17 Cal.3d 129, 160.)

Nor can it be suggested at this late date that rent control is not rationally related to the municipality's legitimate exercise of its police power. We observed in *Birkenfeld* that, as in the present case, "[t]he charter amendment includes in its stated purposes for imposing rent control the alleviation of the ill effects of the exploitation of a housing shortage by the charging of exorbitant rents to the detriment of the public health and welfare of the city and particularly its underprivileged groups. [Citation.] The amendment thus states on its face the existence of conditions in the city under which residential rent controls are reasonably related to promotion of the public health and welfare and are therefore within the police power." (Ibid.) Furthermore, *Birkenfeld* very clearly establishes that, even absent a so-called "housing emergency," local regulation of rents for the purposes stated in section 3 of the present ordinance is a rational exercise of the municipality's police power. (Id. at pp. 153-164; *Carson Mobilehome Park Owners' Assn.* v. *City of Carson* (1983) 35 Cal.3d 184, 189, fn. 4.)

Neither can plaintiffs demonstrate that the regulation fails to operate in an even handed manner. The only possible theory of discriminatory treatment of similarly situated landlords concerns section 5, subdivision (f), of the ordinance. When the regulation was passed, this provision exempted "[r]ental units in a residential property which is divided into a maximum of four (4) units where one of such units is occupied by the landlord as his/her principal residence,"[29] but limited the

[29] This subdivision was amended in 1982 to limit the exemption to rental property divided into two units. See *ante*, page _____*, footnote 2.

* *Infra* A-4.



exemption to "rental units that would have been exempt under the provisions of this Ordinance had this Ordinance been in effect on December 31, 1979." Plaintiffs do not challenge the exemption itself; instead, they challenge subdivision (f), to the extent that it excludes from the exemption any property that became owner-occupied after December 31, 1979.

As defendants point out, however, the challenged exclusion from the exemption bears a debatable rational relationship to the purposes of the ordinance. The Berkeley electorate could reasonably have determined that the exclusion was desirable to prevent some landlords from avoiding application of the ordinance by evicting tenants and moving into their rental property after the provisions of the proposed ordinance became known. (See Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade* (1983) 35 Rutgers L.Rev. 723, 758 & fn. 128 [suggesting that in jurisdictions without the exemption limitation, such abuse is widespread].)[30] Because the disparate treatment afforded similarly situated landlords is supported by a debatable rational basis, this aspect of plaintiffs' challenge must also be rejected. (*Clover Leaf Creamery*, supra, 449 U.S. 456, 464; *New Orleans* v. *Dukes* (1976) 427 U.S. 297, 303; *Hale* v. *Morgan* (1978) 22 Cal.3d 388, 395.)

Finally, plaintiffs suggest no alternative, equally effective approach to achieving defendants' legitimate local purposes by means that would have a less intrusive impact on federal antitrust policies. Indeed, such a showing could be made only after extensive evidence has been taken in the trial court. We therefore hold that plaintiffs have failed to establish that the ordinance on its face conflicts with section 1 of the Sherman Act.

[30] Although plaintiffs argue that any landlords so disposed would already have taken such measures because rental propeorty of four or fewer units was already exempt from rent control by the terms of a prior ordinance (the Temporary Rent Stabilization Ordinance, passed by the Berkeley City Council eff. Dec. 30, 1979), this response ignores the fact that the ordinance now in question is far more comprehensive than its recent predecessor.

### C. Facial Validity of the Ordinance Under Section 2 of the Sherman Act

Plaintiffs also assert that the ordinance on its face violates section 2 of the Act. That section provides inter alia that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony. . . ." (15 U.S.C. § 2.)

In the context of reviewing the legality of private business conduct, the United States Supreme Court has established that the "offense" of monopolization consists of two elements: (1) possession of "monopoly power" in the relevant market, and (2) willful acquisition of that power. (*United States* v. *Grinnell Corp.* (1966) 384 U.S. 563, 570-571.) "Monopoly power" has been defined as the "power to control prices or exclude competition." (*United States* v. *du Pont Co.* (1956) 351 U.S. 377, 391 & fn. 18.) The existence of such power may be inferred from a defendant's predominant share of the relevant market. (*Grinnel,* supra, 384 U.S. at p. 571 [87 percent of market is monopoly power]; *American Tobacco Co.* v. *United States* (1946) 328 U.S. 781, 797 [two-thirds to 80 percent of market is monopoly power].) Seizing on these principles, plaintiffs claim the ordinance is "obviously" invalid because it represents a willful acquisition of power to control prices of all covered rental units in Berkeley—23,000 of the 27,000 units in that city.

Although plaintiffs' claim would likely have merit if defendants were private business parties and if the restraint was proved to affect interstate commerce, for reasons discussed above we will not mechanically apply to municipal defendants, rules of law fashioned exclusively in the context of private business regulation. Instead, and assuming, over defendants' vehement protestations, that section 2 of the Act applies to a party that is not itself a competitor in the relevant market that it is accused of monopolizing, we apply the test articulated *ante,* at page *.

* *Infra* A-31 to 32.



As explained previously, the stated objectives of the ordinance indicate a legitimate local purpose. Plaintiffs do not contend that the ordinance was implemented through misconduct, conflict of interest, or in order to affect discrimination—all factors that would tend to rebut defendants' claim of a legitimate purpose. (See *Cirace,* supra, 61 Tex.L.Rev. at p. 498.) It is established that the means invoked by defendants' ordinance is a rational exercise of the municipality's police power. Plaintiffs have cited no evidence tending to show that the ordinance fails to regulate similarly situated competitors in a reasonably evenhanded manner. Finally, they suggest no equally effective alternative to accomplish these legitimate local purposes by means that would have a less intrusive impact on federal antitrust policies. We therefore conclude that plaintiffs have failed to establish that the ordinance on its face conflicts with section 2 of the Sherman Act.

Because we determine that plaintiffs have not established a conflict with the Act, we do not address whether the ordinance may be exempt from antitrust scrutiny under *Boulder.* (*Rice* v. *Norman Williams Co.,* supra, 458 U.S. at p. 662, fn. 9.) We proceed to analyze plaintiffs' additional constitutional and statutory contentions.

## II.

## Rent Control Issues[31]

### A. Facial Validity of the Ordinance's "Fair Return" Standard

The primary dispute in the trial court and one of the primary substantive questions posed on this appeal concerns whether a rent control ordinance is facially constitutional if it provides that a landlord is to receive a fair return on his investment rather than a fair return on the value of his property.[32] The parties, assisted by amici curiae on both sides of

[31] As preliminary matter, we reject plaintiffs' procedural claim that it was improper for the court to grant judgment on the pleadings because this denied them the opportunity to present evidence as to their claims of confiscation, denial of equal protection, and unlawful restraint on alienation. On a defense motion for judgment on the pleadings, all facts alleged in the complaint are deemed admitted. (*Sullivan* v. *County of Los Angeles* (1974) 12 Cal.3d 710, 714, fn. 3; *Colberg, Inc.* v. *State of California ex rel. Dept. Pub. Wks.* (1967) 67 Cal.2d 408, 411-412.) There was no need for plaintiffs to present any evidence. Further, although they claim that judgment on the pleadings denied them a declaration as to facial invalidity, the judgment expressly declared the ordinance "valid on its face." It is well established that a motion for judgment on the pleadings "may be used in an action for declaratory relief to obtain a *declaratory judgment on the merits in favor of the defendant* rather than a dismissal of the plaintiff's suit." (4 Witkin, Cal. Procedure (2d ed. 1971), Proceedings Without Trial, § 161, p. 2817, emphasis in original.) Finally, although plaintiffs claim they should have been granted leave to amend their complaint, any amendment to make further factual allegations would only be applicable to the claim that the ordinance was invalid *as applied.* They were granted leave to amend as to this claim, but later dismissed the amended complaint.

[32] In reality, defendants' ordinance employs two administrative standards for setting maximum rents. As discussed *post* at pages _____-_____*, section 11 provides for annual rent adjustment, but precludes the Board from granting such citywide rent adjustment except to offset certain increases in general costs. This is, in essence, a variation on the so-called "maintenance of net operating income," or "cost passthrough" approach. (See *Baar, supra,* 35 Rutgers L.Rev. at pp. 809-816.) Section 12, subdivision (c), on the other hand, provides for individual rent increases based on "all relevant factors, including (but not limited to): .... (8) the landlord's rate of return on investment," as well as the landlord's costs.

* *Infra* A-47 to 49.



the issue, have vigorously briefed and argued their respective views. We must stress at the outset, however, the limited scope of our inquiry in facial challenges such as this. As we made clear in *Birkenfeld,* whether rental regulations are fair or confiscatory depends ultimately on the result reached. (17 Cal.3d 129, 165.) That determination, of course, can only be made by analyzing a challenge to the regulation as applied. Nevertheless, we will declare a regulation invalid on its face "when its terms will not permit those who administer it to avoid confiscatory results in its application to the complaining parties." (Id. at p. 165; see also *Cotati Alliance for Better Housing* v. *City of Cotati* (1983) 148 Cal.App.3d 280, 287, 291; *Hutton Park Gardens* v. *Town Council* (N.J. 1975) 350 A.2d 1, 14-16.)

For more than a decade, rent control agencies throughout this state and the nation have employed a veritable smorgasbord of administrative standards by which to determine rent ceilings. (*Carson,* supra, 35 Cal.3d 184, 188 ["just, fair and reasonable"]; *Cotati Alliance,* supra, 148 Cal.App.3d at p. 286 ["fair and reasonable return on investment"]; *Palos Verdes Shores Mobile Estates, Ltd.* v. *City of Los Angeles* (1983) 142 Cal.App.3d 362, 371 ["just and reasonable return" based on the "maintenance of profit" approach]; *Gregory* v. *City of San Juan Capistrano* (1983) 142 Cal.App.3d 72, 86 [interpreting "return on investment" as requiring a "just and reasonable return on the fair market value of [landlords'] property"]; see also Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade* (1983) 35 Rutgers L.Rev. 723, 781-817 [describing and analyzing the following standards: (1) cash flow/return on gross rent; (2) return on equity (investment); (3) return on value; (4) percentage net operating income; and (5) maintenance of net operating income]; Comment, *Rethinking Rent Control: An Analysis of "Fair Return"* (1981) 12 Rutgers L.J. 617, 640-648 [hereinafter cited *Fair Return*]; Comment, *Rent Control and Landlords' Property Rights: The Reasonable Return Doctrine Revived* (1980) 33 Rutgers I. 165 [hereinafter cited *Reasonable Return Doctrine*].) As we recently stressed in *Carson,* "[r]ent control agencies are not obliged by either the state or federal Constitution to fix rents by

application of any particular method or formula." (35 Cal.3d at p. 191, citing *Power Comm'n* v. *Pipeline Co.* (1942) 315 U.S. 575, 586; *Power Comm'n* v. *Hope Gas Co.* (1944) 320 U.S. 591, 601-602.)

In view of this oft-quoted and oft-followed principle, we are not persuaded by plaintiffs' and amici's apparent contention that the much criticized return on value standard[33]—or any of

[33] Whereas the return on investment standard determines "just and reasonable return" by focusing on the landlord's investment, the return on value standard determines fair return by focusing on the market value of the landlord's property. The fair return on market value standard advocated by plaintiffs and amici was used by the United States Supreme Court in an early railroad rate case, *Smyth* v. *Ames* (1898) 169 U.S. 466, decree mod., 171 U.S. 361, in which the court held that railroads were entitled to rates sufficient, after deducting reasonable operating expenses, to produce a fair return on the fair market value of their assets. (169 U.S. at p. 547.) The Supreme Court later changed its position, and approved use of an approach designed to ensure a fair return on investment. (*Hope Gas*, supra, 320 U.S. at pp. 599-605; see Siegel, *Understanding the Lochner Era: Lessons From the Controversy Over Railroad and Utility Rate Regulation* (1984) 70 Vir.L.Rev. 187, 215-259.) Rejecting the idea that rates set by the Federal Power Commission must be based on the present "fair value" of property, the Hope Gas court observed: "[t]he heart of the matter is that rates cannot be made to depend upon 'fair value' when the value of the going enterprise depends on earnings under whatever rates may be anticipated." (Id. at p. 601.) Implicit in this statement is the suggestion that a return on fair value standard is circular and unworkable. "Value" is the current worth of future benefits that may be derived from an investment. The "value" of a utility company, for example, depends in part on the rates that the utility company may charge for its product. Thus, to set rates by reference to the company's "value" is a circular process. (*Siegel*, supra, 70 Vir.L.Rev. at p. 246 & fn. 253.)

The same circularity problem exists when fair market value concepts are applied in the rent control context. (See *Helmsley* v. *Borough of Fort Lee* (N.J. 1978) 394 A.2d 65, 71-72; *Baar;* supra, 35 Rutgers L.Rev. at pp. 798-803; *Reasonable Return Doctrine*, supra, 33 Rutgers L.Rev.) "Value is an expression of a building's potential capacity to generate rental income and incidental or intangible benefits of ownership during its useful life." (*Fair Return*, supra, 12 Rutgers L.J. at p. 640.) The current "value" of a rental property thus depends in large part on the amount of rental income the property is expected to generate. As in the utility rate cases, the process of using value to determine what rental income shall be permitted becomes circular. (Accord, *Cotati Alliance*, supra, 148 Cal.App.3d 280, 287-289; *Palos Verdes Estates*, supra, 142 Cal.App.3d 362, 370-371.) The *Cotati Alliance* court thus rejected a landlord's claim that a return on value standard is mandated for an ordinance to be facially constitutional: "The fatal flaw in the return on value standard is that income property most commonly is valued through capitalization of its income. Thus, the process of making individual

*(Footnotes continued on following page)*



its variations[34]—is required to be employed by the Board in the present case. We reiterate that selection of an administrative standard by which to set rent ceilings is a task for local governments—in this case the voters themselves—and not the courts. Our only concern in this appeal is whether defendants' fair return on investment standard, on its face, will not permit those who administer it to avoid confiscatory results.[35] (*Birkenfeld*, supra, 17 Cal.3d at p. 165; *Power Comm'n* v. *Pipeline Co.*, supra, 315 U.S. at pp. 585-586; *Hutton Park*, supra, 350 A.2d at

*(Footnotes continued from preceding page)*

rent adjustments on the basis of a return on value standard is meaningless because it is inevitably circular: value is determined by rental income, the amount of which is in turn set according to value. Use of a return on value standard would throughly undermine rent control, since the use of uncontrolled income potential to determine value would result in the same rents as those which would be charged in the absence of regulation. Value (and hence rents) would increase in a never-ending spiral." (148 Cal.App.3d at p. 287; accord, *Helmsley* supra, 394 A.2d at pp. 71-72; *Niles* v. *Boston Rent Control Administrator* (Mass. App. 1978) 374 N.E.2d 296, 300-303.)

[34] Amicus for plaintiffs suggests adoption of the "public utility investment standard," which, it is urged, would result in a base rent commensurate with the value of the regulated property at the time rent controls were imposed. (Cf. Southern California Gas Co. v. *Public Utilities Com.* (1979) 23 Cal.3d 470, 474.) Aside from the questionable propriety of applying public utility law to the very different area of local regulation of private economic transactions, it has been observed that "if there was a housing shortage which caused rents to be artifically high, use of prerent control value as the measure [for calculating fair return] will perpetuate artificially inflated rents. Rent control utilizing this standard is no rent control at all." (*Cotati Alliance*, supra, 148 Cal.App.3d 280, 287.)

[35] As is apparently conceded by both parties, it would be premature and problematic for us to attempt to articulate, in the context of this facial attack, the constitutional test against which specific applications of various administrative standards are to be judged. We will face that question when we review a challenge to rent control as applied to particular plaintiffs. It is sufficient in this case to measure defendants' fair return on investment standard against the general proposition that an administrative standard must be such that it will permit those who administer it to avoid confiscatory results.

On a similar point, we also wish to dispel suggestions based on dictum in *Birkenfeld* that we have previously established, as a constitutional test, a requirement that rent controls must provide landlords a "just and reasonable return on their property." (17 Cal.3d at p. 165.) This statement was made in the context of a broader discussion of the legitimate exercise of local police power, and was most certainly not intended to articulate a constitutional standard. *Birkenfeld's* reference to the term "property" should therefore be viewed with caution; it would be inappropriate to suggest that the *Birkenfeld* statement can be used to predict the specific constitutional standard that we will articulate when we review a challenge to rent control as applied.

pp. 13-16.) If we conclude that the fair return on investment standard affords the Board sufficient flexibility to avoid confiscatory results, we must uphold the ordinance. (*Cotati Alliance,* supra, 148 Cal.App.3d at pp. 289-291.)

Plaintiffs and amici posit a number of due process obstacles and practical difficulties that the Board may face in administering the return on investment standard, but none will prevent the Board from avoiding confiscatory results.

1. *Adjustment of Landlords' Frozen May 1980 Profit Amount, and Consideration of the Effect of Inflation.* One of plaintiff's primary complaints is that section 11 of the ordinance locks landlords into the fixed dollar amount of profit they earned in May 1980,[36] and that in order for the board to avoid confining those landlords who invested long ago with pre-inflation dollars to their May 1980 profit amount, it must be free under section 12 of the ordinance to take into consideration the effect of inflation on individual landlords' investments[37] and award fair returns based on "adjusted" investment figures.[38]

[36] Plaintiffs demonstrate this point by the following hypothetical: In May of 1980, a landlord's gross rental income is $10,000; his operating expenses total $9,000, as follows: mortgage payment of $6,000; property taxes of $1,000; utility bills of $2,000. Thus his net return (profit) is $1,000. In May of 1982 his expenses remain the same except that utility costs increase by $500 to $1,500, thereby reducing his net return to $500. Under these circumstances the section 11 annual general adjustment mechanism allows the Board to provide for a 5 percent increase in rent, to $10,500, so that the landlord's profit amount would be the same number of dollars ($1,000) as it was two years earlier. However, no relief is or can be provided under section 11 for the erosionary effect of two years of inflation on the $1,000 base income, the purchasing power of which has been diminished.

[37] The "effect of inflation" issue was apparently raised for the first time at oral argument in the Court of Appeal. On July 21, 1983, the appellate court vacated submission of the case in order to receive defendants' written concession of July 5, 1983, that the term "fair return on investment" in section 12, subdivisions (c) and (i), may reasonably be interpreted to permit the Board to consider and allow for any decrease in the purchasing power of the landlord's return caused by inflation. Both the court's order and defendants' letter, as well as plaintiffs' response thereto, are part of the record before us on appeal. The issue has been briefed and responses have been filed.

[38] Plaintiffs' point can best be explained by a hypothetical example. Assuming that the Board were to fix a "fair return on investment" at 10 percent for all landlords, the following might occur: Recent investor A has invested $70,000 since 1979, and he earned a profit of $6,000 in 1980. In 1984 he petitions the Board under section 12 for an increase in his return on

*(Footnotes continued on following page)*



Clearly, if the fixed amount of a landlord's profit remains the same year after year his return will in time diminish in real value: it is obvious that a $1,000 "profit" in 1990 will have a much lower value than the same dollar amount of profit in 1980. Furthermore, although a fixed profit amount may produce a reasonable or fair return on investment for low-risk investments such as bonds, we must agree with plaintiffs that investment in rental units contemplates a higher risk and hence, in times of high inflation and when viewed in the long term, demands more than mere maintenance of an existing profit amount. (*Cotati Alliance,* supra, 148 Cal.App.3d at p. 295; *Hutton Park Gardens* v. *Town Council* (N.J. 1975) 350 A.2d 1, 15 [a just and reasonable return on investment is one that is generally commensurate with returns on investments in other enterprises having comparable risks].) Therefore, although defendants' ordinance may properly *restrict* landlords' profits on their rental investments, it may not indefinitely *freeze* the dollar amount of those profits without eventually causing confiscatory results. (*Cotati Alliance,* supra, at p. 293 ["If the net operating profit of a landlord continues to be the identical number of dollars, there is in time a real diminution to the landlord which eventually becomes confiscatory."].)

In determining the facial validity of the ordinance against plaintiffs' claim that it must be interpreted to require the Board to account for the effect of inflation on investment in determining a landlord's amount of profit or return, we adhere to the

*(Footnotes continued from preceding page)*

investment. Under its 10 percent return on investment standard, the Board may grant A an increase of $1,000, so that his 1984 amount of profit is $7,000. Additional contributions to capital could, of course, also yield a 10 percent return.

In contrast, long-term investor B has invested $40,000 since 1950, and he, too, earned a profit of $6,000 in 1980. However, when in 1984 he petitions the Board under section 12 for an increase in his return on investment, he will be turned down if the Board mechanically multiplies his $40,000 investment by a 10 percent return. Hence, B would be limited to his frozen May 1980 amount of return—$6,000. Only if (as plaintiffs suggest is mandatory) the Board takes into account the effect of inflation on his investment, and "adjusts" his investment figure accordingly, or if (as §12, subd. (c)(8), seems to allow (see *post,* p. ___*, fn. 39)) the Board assigns him a higher rate of return, may he secure an increase in the amount of profit he received in 1980.

* *Infra* A-42.

rule earlier stressed, that whether a regulation produces a return that is confiscatory or fair depends ultimately on the result, and that we will invalidate an ordinance on its face only if its terms preclude avoidance of confiscatory results.

First, it is not apparent that the ordinance on its face precludes alternative means of adjusting landlords' frozen May 1980 profit amounts.[39] Moreover, even assuming arguendo that a confiscatory result might occur in a future individual case if the Board fails to invoke measures necessary to adjust the dollar amount of a landlord's May 1980 profit, this would still provide us no basis on which to invalidate the entire ordinance, or its administrative "fair return on investment" standard. Unlike *Birkenfeld,* in which we determined that inherent and unnecesary procedural defects inevitably deprived all landlords of due process "except perhaps for a lucky few" (17 Cal.3d at p. 172), in this case, by contrast, it is unknown what percentage of landlords might be able to prove unconstitutional confiscation if the Board fails to consider the effect of inflation on dollars invested in order to adjust a landlord's frozen profit amount. Nor do we have before us any evidence to suggest that when faced with such a prospect, the Board will decline to invoke measures within its powers to adjust individual profit amounts. In this regard we observe that "[i]t is to be presumed that the board will exercise its powers in conformity with the requirements of the Constitution; and if it does act unfairly, the fault lies with the board and not the statute." (*Butterworth* v. *Boyd* (1938) 12 Cal.2d 140, 149.) Until we are required to review a specific challenge to the Board's application of the ordinance, we note simply that, as defendants themselves concede (*ante,* p. *, fn. 37), the ordinance is not drawn so narrowly as to preclude consideration of the effect of inflation

[39] For example, nothing in the ordinance precludes the Board from adjusting the rate (percentage) of return on investment in order to increase a landlord's amount of profit. Indeed, the ordinance seems to contemplate ad hoc adjustment of individual landlord's rates of return in order to reach this result: section 12, subdivision (c)(8), provides that in making individual adjustments the Board shall consider "[t]he landlord's *rate* of return on investment." (Emphasis added.) See section 12, subdivision (c), set out *post,* page **, footnote 46.

* *Infra* A-40.

** *Infra* A-49.



on a landlord's investment in those cases in which the Board might deem it necessary to take that factor into account in order to avoid causing a confiscatory result.[40]

2. *Irrational Discrimination.* Plaintiffs also argue that the investment standard denies equal protection because it will result in different rent ceilings for comparably valued rental units. This issue was raised and properly decided in *Cotati Alliance,* in which the court observed that such disparate treatment bears a debatable rational relationship to a legitimate public purpose: the voters could have reasonably concluded that the investment standard, more effectively than a value-based standard, ensures noninflated, reasonable rents for citizens in times of high inflation. (*Cotati Alliance,* supra, 148 Cal.App.3d 280, 292; see *Hale* v. *Morgan* (1978) 22 Cal.3d 388, 395.)

3. *Ascertaining the Extent of a Landlord's "Investment".* Plaintiffs next predict problems applying the investment standard to landlords who, for various reasons, have made little or no cash investment. However, those who purchased with no down payment, improved property years ago with "preinflation dollars," or who obtained property through gift or inheritance, need not be deprived of a fair return simply because they made no initial monetary investment. The ordinance does not confine "investment" to such a restrictive definition. The Board, therefore, is not precluded, in appropriate cases, from considering as "investment," a landlord's personal labor in improving his property. (*Cotati Alliance,* supra, 148 Cal.App.3d at pp.

[40] Nothing in the ordinance requires the Board to fix a landlord's return based only on his "actual" investment. Further, although section 12, subdivision (c), contains a list of "relevant factors" to be considered by the Board in determining the appropriate amount of a landlord's rents, these factors are expressly nonexclusive. And perhaps most significant, subsection (8) of subdivision (c), permits the Board to consider "all relevant factors" in determining the "landlord's rate of return on investment." See section 12, subdivision (c), set out *post* at page ___*, footnote 46.

* *Infra* A-49.

We read *Cotati Alliance* to be consistent with our determination today. That case merely suggests that a rent board *"may"* consider the effect of inflation if doing so is necessary to assure a landlord a fair return, and hence avoid a confiscatory result, in a specific case. (148 Cal.App.3d at p. 289.)

387, 289.) Nor is the Board precluded from imputing the transferor's "investment," adjusted as might be necessary, to landlords who obtained property by gift or inheritance. (Ibid.; *Fair Return,* supra, 12 Rutgers L.J. at p. 645.) Furthermore, the ordinance does not preclude the Board from considering "forms of investment such as mortgage payments toward principal, [or] cash invested in later improvements in the property" (*Cotati Alliance*, 148 Cal.App.3d at p. 287), or, with certain exceptions,[41] the terms of a landlord's individual financing obligations. In fact, the ordinance directly provides for such flexible application of the investment standard. Subdivision (i) of section 12 provides that "[no]o provision of this Ordinance shall be applied so as to prohibit the Board from granting an individual rent adjustment that is demonstrated necessary by the landlord to provide the landlord with a fair return on investment."

4. *Deprivation of Full Long-Term Appreciation.* Finally, amicus for plaintiffs appears to argue that the ordinance's investment standard is unconstitutional on its face because it unfairly deprives landlords of full long-term appreciation on the value of their regulated property. The thrust of this contention is apparently aimed at establishing that, as a matter of due process, rent control ordinances must guarantee all landlords a fair return on the full market value of their property. This issue was also raised in *Cotati Alliance*, in which the court observed that "[s]ome lessening of appreciation is a necessary consequence of any rent control, since future appreciation is to a significant extent a function of increased rental income. [Citation.] It is one of the very sources of long-term appreciation—inflated rents—that rent control measures are intended to restrict." (148 Cal.App.3d at p.290.)[42]

The fallacy of plaintiffs' contention is readily apparent. Any price-setting regulation, like most other police power regulations of property rights, has the inevitable effect of

[41] See section 12, subdivisions (d) and (e), set out *post,* page —*. footnote 53.

* *Infra* A-52.

[42] The Court further noted: "[l]andlords also argue that the ordinance unfairly denies long-time landlords any appreciation from the time of acquisition to the date when rents were first controlled, but the ordinance did not *reduce* rents when it was enacted, and thus, did not affect preordinance appreciation." (Id. at pp. 290-291 (emphasis in original).)



reducing the value of regulated properties. But it has long been held that such reduction in property value does not by itself render a regulation unconstitutional. Police power legislation results in a confiscatory "taking" only when the owner has been deprived of substantially all reasonable use of the property. (*Agins* v. *City of Tiburon* (1979) 24 Cal.3d 266, 277, affd. (1980) 447 U.S. 255.) Even a significant diminution in value is insufficient to establish a confiscatory taking. (*Euclid* v. *Ambler Realty Co.* (1926) 272 U.S. 365 [75 percent reduction in value because of zoning law insufficient to establish a taking]; *Hadacheck* v. *Sebastian* (1915) 239 U.S. 394 [nearly 90 percent reduction in value because of use restriction insufficient to establish a taking].) As the United States Supreme Court noted in *Hope Gas Co.,* supra, 320 U.S. at page 601, "[t]he fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid." (Accord, *Penn. Central Transp. Co.* v. *New York City* (1978) 438 U.S. 104, 131 [diminution in property value, standing alone, cannot establish a "taking"]; Permian Basin Area Rate Cases (1968) 390 U.S. 747, 769 ["No constitutional objection arises from the imposition of maximum prices merely because . . . the value of regulated property is reduced as a consequence of regulation."].)

Thus, although we need not articulate in this facial attack the precise constitutional standard that all administrative rent control standards must meet (*ante,* p. *, fn. 35), we can state with certainty that a rent control ordinance need not provide for a fair return on the value of a landlord's property in order to survive a facial challenge. We conclude that defendants' fair return on investment standard will not preclude the Board from avoiding confiscatory results, and hence the administrative standard established in the ordinance is constitutionally valid n its face. (Cal.Const., art. I, § 7; accord, *Oceanside Mobilehome Park Owners' Assn.* v. *City of Oceanside* (1984) 157 Cal.App.3d 887, 897-900; *Cotati Alliance,* supra, 148 Cal.App.3d at pp. 288-289, and cases and authorities cited.)[43]

[43] To the extent it is contrary to this determination, *Gregory* v. *City of San Juan Capistrano* (1983) 142 Cal.App.3d 72, 85-86 is disapproved.

* *Infra* A-39.

**B. Facial Validity of the Ordinance's Rent Adjustment Procedures**

As we observed recently in *Carson,* "[when] rent ceilings of an indefinite duration are established, a mechanism must be provided for granting those increases necessary to permit landlords a just and reasonable return. 'The mechanism is sufficient for the required purpose only if it is capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary.' " (35 Cal.3d at p. 191, quoting *Birkenfeld,* supra, 17 Cal.3d at p. 169.) As plaintiffs observe, "[p]roperty may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them . . ." (*Smith* v. *Illinois Bell Tel. Co.* (1926) 270 U.S. 587, 591.)

Of course, some delays are inherent in any rent control scheme. But, "only those delays which are longer than practically necessary to achieve the legitimate purposes of the legislation are constitutionally proscribed." (*Carson,* supra, 35 Cal.3d at p. 192; *Birkenfeld,* supra, 17 Cal.3d at pp. 169, 173.)

The test used to review the facial validity of defendants' adjustment procedures is the same one used above to review the ordinances' administrative standard for individual maximum rent adjustments under section 12. We will declare the adjustment procedures invalid only if the ordinance on its face will not permit the Board to avoid confiscatory results. Although in *Birkenfeld* we found Berkeley's former ordinance facially unconstitutional on this basis because, by its terms, it precluded reasonably prompt action in most cases, the ordinance before us now contains none of the problems found in the former regulation.

The prior ordinance had no provision for "general rental adjustments for all or any class of rental units based on generally applicable factors such as property taxes." (*Birkenfeld,* 17 Cal.3d at p. 171) Although we recently recognized in *Carson* that a rent control ordinance need not have a general adjustment provision to pass constitutional muster (35 Cal.3d at p. 194), such a mechanism will be required when the



"magnitude of the job to be done" (*Birkenfeld,* at p. 169) so demands. Since we decided *Birkenfeld* the number of rental units in Berkeley subject to rent control has increased to 23,000. However, the exact mechanism found wanting in 1976 is present in the ordinance before us now in section 11[44]—a

[44] Section 11, as amended in 1982 (see *ante,* p. _____*, fn. 2), provides in full (deletions are stricken with a horizontal line; additions are in italics):

"a. Once each year, the Board shall consider setting and adjusting the rent ceiling for all rental units covered by this Ordinance in general and/or particular categories of rental units covered by this Ordinance deemed appropriate by the Board. The Board shall hold at least two public hearings prior to making any annual general adjustment of the rent ceilings. ~~The first such public hearing shall be conducted no later than October 31, 1980, and the first annual general adjustment shall be made no later than December 31, 1980.~~ *The Board shall publish and publicize notices of the date, time, and place of the public hearings at least thirty (30) days prior to the hearing date. The two required public hearings shall be conducted and the annual general adjustment shall be set between September 1 and October 31, of each year. The annual adjustment shall become effective the following January 1.*

"b. In making annual general adjustments of the rent ceiling, the Board shall:

"(1) Adjust the rent ceiling upward by granting those landlords who pay for utilities a utility adjustment for increases in the City of Berkeley for utilities.

"(2) Adjust the rent ceiling upward by granting landlords a property tax, maintenance and operating expense increase adjustment (exclusive of utilities) for increases in the City of Berkeley for property taxes and maintenance and operating expenses.

"(3) Adjust the rent ceiling downward by requiring landlords to decrease rents for any decreases in the City of Berkeley for property taxes.

"(4) *Adjust the rent ceiling downward by requiring landlords who pay for utilities to decrease rents for any decreases in the City of Berkeley for utilities.*

"In adjusting rents *ceilings* under this subsection, the Board shall adopt a formula or formulas of general application. This formula will be based upon ~~a survey of~~ *the annual rent registration forms, surveys, information and testimonies presented at public hearings, and* other available data indicating increases or decreases in the expenses *relating to the rental housing market* in the City of Berkeley set forth in this subsection. For maintenance and operating expense adjustments, the Board may also use survey data from surrounding communities where appropriate. The Board shall make no more than one annual adjustment of rent ceilings per rental units per year.

"*Adoption of a formula greater than forty-five percent (45%) of the increase in the Consumer Price Index for the twelve months ending the previous June 30 shall require the affirmative vote of six (6) Commissioners, other provisions notwithstanding. Adoption of such a formula shall be a specific and special exception to the requirement of only five (5) affirmative votes to make a decision. For the purposes of this subsection, the Consumer Price Index shall*

* *Infra* A-4.

*(Footnotes continued on following page)*

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comprehensive scheme that provides for annual[45] across the board adjustment based on "cost" factors.

The adjustment for all landlords under section 11 is designed to allow landlords to retain the generally same dollar amount of profit in subsequent years that they received in May

*(Footnotes continued from preceding page)*

*mean the Consumer Price Index for all urban consumers in San Francisco—Oakland, all items (1967 equals 100), as reported by the Bureau of Labor Statistics of the U.S. Department of Labor, as it pertains to the City of Berkeley.*

"c. An upward general adjustment in rent ceilings does not automatically provide for a rent increase. Allowable rent increases pursuant to a general upward adjustment shall become effective only after the landlord gives the tenant at least a thirty (30) days written notice of such rent increase and the notice period expires.

"d. If the Board makes a downward general adjustment in the rent ceilings, landlords of rental units to which this adjustment applies shall give tenants of such rental units written notice of the rent decrease to which they are entitled. Such rent decreases shall take effect not later than thirty (30) days after the effective date set by the Board for the downward general adjustment.

"e. If the maximum allowable rent specified under this Ordinance for a rental unit is greater than the rent specified for such unit in the rental agreement, the lower rent specified in the rental agreement shall be the maximum allowable rent until the rental agreement expires. If the maximum allowable rent specified under this Ordinance for a rental unit is less than the rent specified for such unit in the rental agreement, the lower rent specified under this Ordinance shall be the maximum allowable rent.

"f. No rent increase pursuant to an upward general adjustment of a rent ceiling shall be effective if the landlord:

"(1) Has continued to fail to comply, after order of the Board, with any provisions of this Ordinance and/or orders or regulations issued thereunder, or

"(2) Has failed to bring the rental unit into compliance with the implied warranty of habitability, *or*

"(3) *Has failed to make repairs as ordered by the Housing Inspection Services of the City of Berkeley, or*

"(4) *Has failed to completely register by September 1, except as provided in Subsection 11.g. below.*

"g. The amount of an upward general adjustment for which a landlord shall be eligible shall decrease by ten (10) percent per month for each month beyond December 1 for which the landlord fails to register.

"h. A landlord who is ineligible to raise rents under an upward general adjustment for an entire calendar year shall not be eligible to raise rents under that particular general adjustment in future years."

[45] We are informed by amicus that general adjustments under section 11 in the past four years have been as follows: 1981, 5 percent (6.21 if the landlord provided space heating); 1982, 9 percent; 1983, 5 percent; 1984, no increase (apparently because of the low inflation rate for 1983). See *Baar*, supra, 35 Rutgers L.Rev. at pages 779-780.



1980. In order to acquire rent increases that reflect cost increases not imposed on other landlords generally, or in order to seek an increase in dollar amount of return (i.e., the dollar amount of profit), a landlord must secure an individual adjustment pursuant to section 12, subdivision (c).[46] And, as observed *ante* at pages - *, unless landlords have reasonable access to such individual adjustments, the ordinance has the potential for producing unconstitutional results.

[46] Section 12, subdivision (c), provides in full:

"In making individual adjustments of the rent ceiling, the Board or the hearing examiner shall consider the purposes of this Ordinance and shall specifically consider all relevant factors, including (but not limited to):

"(1) Increases or decreases in property taxes;

"(2) Unavoidable increases or any decreases in maintenance and operating expenses;

"(3) The cost of planned or completed capital improvements to the rental unit (as distinguished from ordinary repair, replacement and maintenance) where such capital improvements are necessary to bring the property into compliance or maintain compliance with applicable local code requirements affecting health and safety, and where such capital improvement costs are properly amortized over the life of the improvement;

"(4) Increases or decreases in the number of tenants occupying the rental unit, living space, furniture, furnishings, equipment, or other housing services provided, or occupancy rules;

"(5) Substantial deterioration of the controlled rental unit other than as a result of normal wear and tear;

"(6) Failure on the part of the landlord to provide adequate housing services, or to comply substantially with applicable state rental housing laws, local housing, health and safety codes, or the rental agreement;

"(7) The pattern of recent rent increases or decreases;

"(8) The landlord's rate of return on investment. In determining such return, all relevant factors, including but not limited to the following shall be considered: the landlord's actual cash down payment, method of financing the property, and any federal or state tax benefits accruing to landlord as a result of ownership of the property;

"(9) Whether or not the property was acquired or is held as a long-term or short-term investment; and

"(10) Whether or not the landlord has received rent in violation of the terms of this Ordinance or has otherwise failed to comply with the Ordinance.

"It is the intent of this Ordinance that individual upward adjustments in the rent ceilings on units be made only when the landlord demonstrates that such adjustments are necessary to provide the landlord with a fair return on investment."

* *Infra* A-40 to 43.

In comparison to the procedures for individual adjustment in Berkeley's former regulation—which, we said, "put the Board in a procedural strait jacket" (*Birkenfeld,* supra, 17 Cal.3d at p. 171)—the ordinance before us now is solicitous of due process. The initiative drafters apparently studied *Birkenfeld,* and took it to heart: every major procedural failing that we noted in the former ordinance has been addressed, and additional procedural protections not previously mentioned have been included.

The previous Berkeley ordinance found invalid in *Birkenfeld* (1) did not allow a landlord to file a petition for rent adjustment unless it was accompanied by a certificate of building code compliance from the city's building code department; (2) gave the Board no power to consolidate petitions for units in the same building, unless the tenants consented; and (3) gave the Board (five members each paid a maximum of $2,400 per year) no power to delegate the holding of hearings to hearing officers, or even to members or panels of the Board. (17 Cal.3d at pp. 170-171.) As defendants point out, none of these "defects" appear in the new ordinance: (1) there is no requirement that a landlord's petition be accompanied by a certificate from the building department, or from anyone else;[47] (2) the Board is expressly given the power to consolidate a landlord's petitions for units in the same building—whether or not the tenants consent;[48] and (3) the ordinance expressly gives the Board the power to appoint hearing officers to hold

[47] Section 12, subdivision (a) provides in full: "Petitions. Upon receipt of a petition by a landlord and/or tenant, the rent ceiling of individual controlled rental units may be adjusted upward or downward in accordance with the procedures set forth elsewhere in this Section. The petition shall be on the form provided by the Board. The Board may set a reasonable per unit fee based upon the expenses of processing the petition to be paid by the petitioner at the time of filing. No petition shall be filed before September 1, 1980. Notwithstanding any other provision of this Section, the Board or hearing examiner may refuse to hold a hearing and/or grant an individual rent ceiling adjustment for a rental unit if an individual hearing has been held and decision made with regard to the rent ceiling for such unit within the previous six months."

[48] Section 12, subdivision (b)(9) provides in full: "Consolidation. All landlord petitions pertaining to tenants in the same building shall be consolidated for hearing, and all petitions filed by tenants occupying the same building shall be consolidated for hearing unless there is a showing of good cause not to consolidate such petitions."



hearings,[49] and the hearing officers are authorized to issue decisions that are final unless appealed to the Board.[50] Additionally, the new ordinance imposes a time limit of 120 days on all decisions on landlord petitions.[51]

Defendants' new ordinance clearly avoids the confiscatory delays inherent in the former regulation's unit-by-unit procedure. It provides for general citywide increases to cover common costs, and its individual adjustment procedures are designed to assure reasonably prompt consideration of landlords' claims.[52] These procedures are reasonably related to

[49] Section 12, subdivision (b)(1) provides in full: "Hearing Examiner. A hearing examiner appointed by the Board shall conduct a hearing to act upon the petition for individual adjustments of rent ceilings and shall have the power to administer oaths and affirmations."

[50] Section 12, subdivision (b)(11) provides in full: "Finality of Decision. The decision of the hearing examiner shall be the final decision of the Board in the event of no appeal to the Board. The decision of the hearing examiner shall not be stayed pending appeal; however, in the event that the Board or panel reverses or modifies the decision of the hearing examiner, the Board shall order the appropriate party to make retroactive payments to restore the parties to the position they would have occupied had the hearing examiner's decision been the same as that of the Board's."

[51] Section 12, subdivision (b)(12) provides in full: "Time for Decision. The rules and regulations adopted by the Board shall provide for final Board action on any individual rent adjustment petition within one hundred and twenty (120) days following the date of filing of the individual rent ceiling adjustment petition, unless the conduct of the petitioner or other good cause is responsible for the delay." As defendants point out, it is clear that the 120-day rule also applies to petition determinations that are appealed to the Board.

[52] Like the 105-day provision that we recently reviewed in *Carson,* we do not believe that the time allowed for review under section 12 is excessive. Within the 120-day time limit, "the Board must (1) review all information provided by the applicants, including complex financial and tax data, (2) review comments received from tenants, and (3) hold a hearing at which the interested parties are permitted to testify. [¶] Careful review of the information provided to the Board is important. The financial and tax data submitted by the applicant reveals whether the owner's profits have increased or decreased, whether the property taxes or operating costs associated with the [property] have increased or decreased, and whether any capital improvements have been made. Review of the information supplied by the tenants helps the Board determine whether there has been any increase or decrease in the services provided by the [landlord]." (35 Cal.3d at pp. 193-194.)

We stress that only the facial validity of the ordinance is currently before the court. Whether individual landlords might prove a denial of due process because of delays exceeding the 120-day time limit is a question of great concern, but it is not before us at this time.

achievement of the ordinance's stated purpose of, inter alia, preventing excessive rents. By its own terms, the ordinance will permit the Board to avoid confiscatory results; we therefore conclude that the ordinance, on its face, guarantees plaintiffs due process. (Cal.Const., art I, § 7; *Birkenfeld,* supra, 17 Cal.3d at pp. 165, 173.)

**C. Unreasonable Restraint on Alienation**

At the same time that mechanical application of the fair return on investment standard may have the potential to produce confiscatory results in some individual cases (*ante,* pp. - *) it is also recognized that the standard has the potential for awarding windfall returns to recent investors whose purchase prices and interest rates are high. If this latter aspect were unregulated, use of the investment standard might defeat the purpose of rent price regulation. To prevent this result, defendants' ordinance, like others in the state (see *Baar,* supra, 35 Rutgers L.Rev. at p. 788, fn. 249), contains two "antispeculation" clauses that prohibit the Board from considering certain increases in mortgage interest payments when those increases occur after adoption of the ordinance. (Id. at pp. 788, 792.) Thus, except when refinancing is necessary to make capital improvements or in cases of individual hardship to buyers, section 12, subdivisions (d) and (e),[53] preclude the Board from

* *Infra* A-40 to 43.

[53] These subdivisions provide in full: "d. No individual upward adjustment of a rent ceiling shall be authorized by the Board by reason of increased interest or other expenses resulting from the landlord's refinancing the rental unit if, at the time the landlord refinanced, the landlord could reasonably have foreseen that such increased expenses could not be covered by the rent schedule then in existence, except where such refinancing is necessary for the landlord to make capital improvements which meet the criteria set forth in Section 12.c.(3). This paragraph shall only apply to that portion of the increased expenses resulting from the refinancing that were reasonably foreseeable at the time of the refinancing of the rental unit and shall only apply to rental units refinanced after the date of adoption of this Ordinance. [¶] e. Except for cases of individual hardship as set forth in Subsection 12.i. of this Ordinance, no individual upward adjustment of a rent ceiling shall be authorized by the Board because of the landlord's increased interest or other expenses resulting from the sale of the property, if at the time the landlord acquired the property, the landlord could have reasonably foreseen that such increased expenses would not be covered by the rent schedule then in effect. This Subsection (12.e.) shall only apply to rental units acquired after the date of adoption of this Ordinance."



authorizing an individual rent increase because of increased interest or other expenses resulting from sale or refinancing of rental property, if the landlord could reasonably have foreseen that such increased expenses could not be covered by the "existing" rent schedule.

Plaintiffs do not challenge the constitutional reasonableness of the classification created by these restrictions; instead, they claim these provisions constitute unreasonable restraints on alienation in that they will inhibit sales of rental property at a fair market value in violation of Civil Code section 711. That section states simply, "[c]onditions restraining alienation, when repugnant to the interest created, are void." Plaintiffs' contention, however, ignores ordinance section 12, subdivision (i), which cautions, "[n]o provision of this Ordinance shall be applied so as to prohibit the Board from granting an individual rent adjustment that is demonstrated necessary by the landlord to provide the landlord with a fair return on investment." This safety valve overrides all other provisions of the ordinance and averts any danger that subdivisions (d) and (e) might prevent a purchaser from realizing a fair return, and thus prevents any unreasonable restraint on alienation. (See generally *Wellenkamp* v. *Bank of America* (1978) 21 Cal.3d 943, 948.)

Furthermore, even if the two subdivisions were assumed to create an unreasonable restraint, we are persuaded by defendants' contention that Civil Code section 711 does not, and was never intended to, apply to municipal ordinances. Our review of that statute and the many cases that apply it reveals that it addresses only private restraints on alienation, and not government regulations. (Cf. 3 Witkin, Summary of Cal. Law (8th ed. 1973) Real Property, § 314, p. 2024 [the rule against restraints on alienation "is directed against the provisions in contracts or conveyances. It has no application to disabling restraints established by express statute."]; Rest., Property, pp. 2377, 2381.) None of the cases cited by plaintiffs or amici supports a contrary view.

**D. Retaliatory Eviction Presumption**

Typically, rent control schemes include eviction controls that require "good cause" in order for a landlord to bring an eviction action. Without such controls, "the security of tenure objectives of rent control laws could be undermined and the threat of eviction could be used to nullify the operation of rent regulations." (Baar, supra, 35 Rutgers L.Rev. at p. 833.)

Accordingly, section 14 of the ordinance[54] restates this court's established holding that a landlord's retaliation against a tenant for the tenant's assertion or exercise of rights is a defense to eviction. (*Schweiger* v. *Superior Court* (1970) 3 Cal.3d 507, 517.) The section then provides that, in an action by the landlord to recover possession or in an affirmative action taken by the tenant for damages, "evidence of the assertion or exercise by the tenant of rights under this Ordinance within six months prior to the alleged act of retaliation shall create a presumption that the landlord's act was retaliatory." As originally enacted, the section provided that " '[p]resumption' means that the Court must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence." After the trial court's judgment in this case the latter sentence was amended in 1982 (see *ante*, p. *, fn 2) to read, " '[p]resumption' means that

[54] As amended in 1982 (see *ante*, p. *, fn. 2), the section provides (deletions are stricken with a horizontal line; additions are in italics): "No landlord may threaten to bring, or bring, an action to recover possession, cause the tenant to quit the unit involuntarily, *serve any notice to quit or notice of termination of tenancy,* decrease any services or increase the rent where the landlord's intent is retaliation against the tenant for the tenant's assertion or exercise of rights under this Ordinance. Such retaliation shall be a defense to an action to recover possession, or it may serve as the basis for an affirmative action by the tenant for actual and punitive damages and injunctive relief. In an action by or against a tenant, evidence of the assertion or exercise by the tenant of rights under this Ordinance within six months prior to the alleged act of retaliation shall create a presumption that the landlord's act was retaliatory. 'Presumption' means that the Court must find the existence of the fact presumed unless and until ~~evidence is introduced which would support a finding of its nonexistence~~ *its nonexistence is proven by a preponderance of the evidence.* A tenant may assert retaliation affirmatively or as a defense to the landlord's action without the aid of the presumption *regardless of the period of time which has elapsed between the tenant's assertion or exercise of rights under this Ordinance and the alleged act of retaliation.*"

* *Infra* A-4.



the Court must find the existence of the fact presumed unless and until its nonexistence is proven by a preponderance of the evidence."

1. *Classification of the Presumption.* Plaintiffs claim that section 14 purports to create a presumption affecting the burden of proof, and that such presumptions created by municipal ordinance are preempted by state law. (Evid. Code, § 500.) Defendants apparently respond that section 14 creates merely a presumption affecting the burden of producing or going forward with evidence, and that, even if it does create a presumption affecting the burden of proof, section 500 and other relevant sections of the Evidence Code allow such a presumption.

a. *Presumption Affecting the Burden of Producing Evidence.* The burden of producing evidence refers to a party's obligation to introduce evidence sufficient to establish a prima facie case, or, in other words, sufficient to avoid nonsuit. (Evid. Code, § 110.) "A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied." (Evid. Code, § 603.) The code makes clear that the purpose of such a rebuttable presumption relates solely to judicial efficiency, and does not rest on any public policy extrinsic to the action in which it is invoked. A presumption affecting the burden of producing evidence is based on an underlying logical inference that the presumed fact very likely follows from the proved fact; the presumption is designed to avoid unnecessary proof of facts likely to be true if not disputed. Especially relevant to the present case, such a rebuttable presumption is designed to place the responsibility for establishing the nonexistence of certain facts on the party most able to do so. As observed in the California Law Revision Commission's comment on section 603, "[t]he presumptions described in [that section] are not expressions of policy; they are expressions of experience. They are intended solely to eliminate the need for the trier of fact to

reason from the proven or established fact to the presumed fact and to forestall argument over the existence of the presumed fact when there is no evidence tending to prove the nonexistence of the presumed fact."

If the presumption established in section 14 affects the burden of producing evidence, a tenant who shows an assertion or exercise of rights under the ordinance within six months of an eviction proceeding will have established either (1) a prima facie defense to eviction (and will hence avoid nonsuit), or (2) a prima facie case for damages, unless the landlord rebuts the presumption by evidence supporting its nonexistence by a preponderance of the evidence. (Evid. Code, §§ 110, 604.) As noted in the Assembly Committee on the Judiciary's comment on section 604, "[s]uch a presumption is merely a preliminary assumption in the absence of contrary evidence."

b. *Presumption Affecting the Burden of Proof.* The burden of proof, on the other hand, refers to a party's obligation to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact. (Evid. Code, § 115.) Unlike presumptions affecting the burden of producing evidence, which exist merely to expedite resolution of disputes, "[a] presumption affecting the burden of proof is a presumption established to implement some public polity other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of the legitimacy of children, the validity of marriage, the stability of titles to property. . . ." (Evid. Code, § 605.) The purpose of such a rebuttable presumption relates to public policy goals "other than or in addition to the policy of facilitating the trial of actions." (Cal. Law Revision Com. com. on Evid. Code, § 605.) As the California Law Revision Commission observes, "[f]requently, presumptions affecting the burden of proof are designed to facilitate determination of the action in which they are applied. Superficially, therefore, such presumptions may appear merely to be presumptions affecting the burden of producing evidence. What makes a presumption one affecting the burden of proof is the fact that there is always some further reason of policy for the establishment of the presumption. It is the existence of this further basis in policy that distinguishes a presumption affecting the burden of proof from a presumption affecting the burden of producing evidence." (Ibid.)



If a presumption affecting the burden of proof is established by section 14, a tenant who shows an assertion or exercise of rights under the ordinance within six months of the eviction proceeding will effectively shift to the landlord the burden of disproving the tenant's defense or case for damages, by requiring the landlord to prove to the trier of fact, by a preponderance of the evidence, that eviction was not retaliatory. (Evid. Code, §§ 115, 606.) In other words, unlike presumptions affecting the burden of producing evidence, which would merely protect a tenant against nonsuit, a presumption affecting the burden of proof would shift the ultimate responsibility of persuasion to the landlord.

c. *Presumption Created by the Amendment.* Defendants concede that it is difficult to classify the presumption created by section 14. Plaintiffs implicitly recognize the same problem: although they characterized the amended presumption in earlier briefs as a valid presumption affecting the burden of producing evidence, in recent briefs they claim it is an invalid presumption affecting the burden of proof.

Viewing the section's language in the context of the entire ordinance, and in light of the earlier preamendment version, we must agree with plaintiffs that the amended section 14 presumption affects the burden of proof. Regarding the latter point first, we note that the preamendment language paralleled Evidence Code section 604's description of the effect of a presumption affecting the burden of producing evidence: former section 14 specified that "the Court must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence." Evidence Code section 604 similarly provides that a presumption affecting the burden of producing evidence "require[s] the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence."

It thus seems reasonably clear that the former section established a presumption affecting the burden of producing evidence. It would also be reasonable to assume that the amendment was intended to change, rather than simply restate or clarify, the original presumption. First, the amendment

specifically omitted reference to introduction of evidence that would support a finding of the presumed fact's nonexistence—and therefore it departs from the express language of Evidence Code section 604. Moreover, to the extent the amendment was intended to clarify and restate the previous presumption that affected only the burden of producing evidence, the new section would quite obviously be a failure—because its language describes that kind of presumption even less clearly than did its predecessor.

The suggestion that the amendment was intended to implement a presumption affecting the burden of proof, and not merely one affecting the burden of producing evidence, is further supported by defendants' own description of the purpose of the amended presumption. Defendants claim the presumption is intended to further the municipality's policy against retaliatory evictions and to promote the policy of encouraging tenants to exercise their rights under the ordinance. In view of the previous section's subsequent amendment—and because, as defendants admit, section 14 is designed to further policies extrinsic to, or in addition to, the policy of facilitating determination of particular eviction actions—we must conclude that the amended section creates a presumption affecting the burden of proof.

2. *Direct Preemption by the Evidence Code.* Although municipalities have power to enact ordinances creating substantive defenses to eviction (*Birkenfeld,* supra, 17 Cal.3d 129, 149), such legislation is invalid to the extent it conflicts with general state law. (Id. at p. 152; Cal.Const., art XI, § 7.) Plaintiffs claim that section 14, as amended, directly conflicts with Evidence Code section 500, which states: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." They note that under section 14, proof of retaliation is "essential" to establishing the tenant's defense or claim for relief; therefore, they argue, Evidence Code section 500, requires that the tenant prove the fact of retaliation.



Defendants respond that Evidence Code section 500 by its own terms does not apply to situations "otherwise provided [for] by law." Plaintiffs, in turn, maintain that this exception does not contemplate local ordinances or charter amendments.

The term "law," as used in Evidence Code section 500, is defined as including "constitutional, statutory, and decisional law." (Evid. Code, § 160.) Defendants contend that section 160 was not intended to exclude local ordinances as a source of "law," but was merely intended to make clear that the term "law" includes judicial decisions. (See Cal. Law Revision Com. to § 160.) They therefore invite us to construe "statutory" as including ordinances.

Indeed, there have been cases in which courts have suggested that the term "statutes" embraces local ordinances. (*City of Los Angeles* v. *Belridge Oil Co.* (1954) 42 Cal.2d 823, 833-834; *King Mfg. Co.* v. *Augusta* (1928) 277 U.S. 100, 102-114.) Neither of those cases, however, assists defendants. In *Belridge* we observed that a city licensing ordinance could be construed as a statute under the statute of limitations; in *King* the United States Supreme Court construed an ordinance as a statute for the purpose of satisfying jurisdiction. But, in neither case did the court address issues remotely approaching the question posed here: whether a local ordinance can be deemed a "statute" for purposes of deviating from the established rules of evidence relating to burden of proof.

The answer to this question would seem so settled that, like other firm rules of law, few courts have recently had occasion to address the issue. Long before enactment of Evidence Code sections 500 and 160, we suggested that municipal governments have no authority to depart from the common law of evidence. (*Orena* v. *City of Santa Barbara* (1891) 91 Cal. 621, 629 [an "ordinance is void . . . [to the extent that it purports to] lay down rules of evidence . . ."].) Similarly, commentators have maintained that, "[w]ithout express authority the general rules of evidence or procedure may not be changed by ordinance by a municipal corporation" (9 McQuillin, Municipal Corporations (3d ed. 1978) § 27.45, p. 670; see also 2 Dillon, Municipal Corporations (5th ed. 1911) § 643, p. 983), and

that, "[u]nlike the legislature, the governing body of a municipal corporation has no power to prescribe rules of evidence for the guidance of courts. Therefore, a municipal ordinance . . . concerning the burden of proof [is void]." (31 Cal.Jur.3d, Evidence, § 5, at p. 37.) See also *Cohen* v. *St. Louis Merchants' Bridge Terminal Ry.* (Mo.Ct.App. 1916) 181 S.W. 1080, 1081-1082 (" 'The City cannot by ordinance in any wise change or alter the ordinary rules of evidence applicable in this court' "); *Fitch* v. *Pinckard* (Ill. 1842) 4 Scam. 69, 78 (5 Ill. 72, 81) ("[T]he [municipal] corporation exceeded its powers, in declaring that the collector's deed should be evidence of a compliance with all the prerequisites of the ordinance. The legislature alone possesses the power to make, change, or alter the rules of evidence."); cf., *The City Council* v. *Dunn* (S.C. 1821) 1 McCord 333 (in absence of statutory provision to the contrary, an ordinance may not depart from the common law rules of evidence).

Given this background, we cannot believe that the Legislature, when it enacted Evidence Code sections 500 and 160 in 1965, ever intended municipal ordinances to come within the exception clause of Evidence Code section 500. Whether the Evidence Code directly or by implication preempts a local ordinance that purports to create a presumption shifting the burden of producing evidence is a separate issue, on which we reserve decision. (See Evid. Code, § 550, subd. (b).) For now, we conclude that the Legislature deliberately excluded ordinances from those sources of law that may change the traditional allocation of the burden of proof, and that the presumption in section 14 shifting the burden of proof, on its face, directly conflicts with the Evidence Code. (§ 500.) To that extent, the ordinance is invalid.



**E. Due Process and Preemption Challenges to the Ordinance's Rent Withholding Provisions**

Section 15[55] sets out remedies for landlords' violations of the ordinance—e.g., failure to register pursuant to section 8,[56] or charging of rents above those permitted under sections 11 and 12. Section 15, subdivision (a), provides for tenant-initiated remedies: under subsection (1) of that subdivision, a tenant may petition the Board for permission to withhold rent until the landlord complies with the ordinance. Subsection (2) permits the same withholding remedy, even without Board permission, and provides a defense to unlawful detainer if the tenant believes in good faith that the landlord has not complied with the ordinance.[57] Subsection (3) permits a tenant to sue for injunctive relief, and subsection (4) permits a tenant to sue the landlord for money damages.

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[55] This section provides in full:

"a. For Violation of Rent Ceilings or Failure to Register. If a landlord fails to register in accordance with Section 8 of this Ordinance, or if a landlord demands, accepts, receives or retains any payment in excess of the maximum allowable rent permitted by this Ordinance, a tenant may take any or all of the following actions until compliance is achieved:

"(1) A tenant may petition the Board for appropriate relief. If the Board, after the landlord has proper notice and after a hearing, determines that a landlord has wilfully and knowingly failed to register a rental unit covered by this Ordinance or violated the provisions of Sections 10, 11 and 12 of this Ordinance, the Board may authorize the tenant of such rental unit to withhold all or a portion of the rent for the unit until such time as the rental unit is brought into compliance with this Ordinance. After a rental unit is brought into compliance, the Board shall determine what portion, if any, of the withheld rent is owed to the landlord for the period in which the rental unit was not in compliance. Whether or not the Board allows such withholding, no landlord who has failed to comply with the Ordinance shall at any time increase rents for a rental unit until such unit is brought into compliance.

"(2) A tenant may withhold up to the full amount of his or her periodic rent which is charged or demanded by the landlord under the provisions of this Ordinance. In any action to recover possession based on nonpayment of rent, possession shall not be granted where the tenant has withheld rent in good faith under this Section.

"(3) A tenant may seek injunctive relief on behalf of herself or himself to restrain the landlord from demanding or receiving any rent on the unit until the landlord has complied with the terms of this Ordinance.

*(Footnotes continued on following page)*

Subdivision (c) permits the city attorney to sue landlords for injunctive relief, and subdivision (d) permits the Board to do the same. Subdivision (e) permits the Board to settle claims on behalf of tenants.

Plaintiffs focus on the rent withholding provisions of subdivision (a), subsections (1) and (2), which they claim are preempted by state law. Additionally, plaintiffs assert that

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*(Footnotes continued from preceding page)*

"(4) A tenant may file a damage suit against the landlord for actual damages when the landlord receives or retains any rent in excess of the maximum rent allowed under this Ordinance. Upon further proof of a bad faith claim by the landlord or the landlord's retention of rent in excess of the maximum rent allowed by this Ordinance, the tenant shall receive a judgment of up to seven hundred and fifty dollars ($750.00) in addition to any actual damages.

"b. For Violation of Eviction Proceedings. If it is shown in the appropriate court that the event which the landlord claims as grounds to recover possesssion under Subsection 13.a.(7), Subsection 13.a.(8), Subsection 13.a.(9), or Subsection 13.a.(10) is not initiated within two months after the tenant vacates the unit, or it is shown the landlord's claim was false or in bad faith, the tenant shall be entitled to regain possession and to actual damages. If the landlord's conduct was willful, the tenant shall be entitled to damages in an amount of $750 or three times the actual damages sustained, whichever is greater.

"c. The City Attorney may bring an action for injunctive relief on behalf of the City or on behalf of tenants seeking compliance by landlords with this Ordinance.

"d. The Board may seek injuctive relief to restrain or enjoin any violation of this Ordinance or of the rules, regulations, orders and decisions of the Board.

"e. If a tenant fails to bring a civil or administrative action within one hundred and twenty (120) days from the date of the first occurrence of a violation of this Ordinance, the Board may either settle the claim arising from the violation or bring such action. Thereafter, the tenant on whose behalf the Board acted may not bring an action against the landlord in regard to the same violation for which the Board has made a settlement or brought an action. In the event the Board settles the claim it shall be entitled to retain from any payments made by the landlord, the costs it incurred in settlement, and the tenant aggrieved by the violation shall be entitled to the remainder."

[56] This section provides, inter alia, that by a specified date landlords must file a rent registration form showing rents in effect on certain prior dates for each rental unit covered by the ordinance.

[57] Defendants point out that although the subsection (2) remedy might be more effective, the subsection (1) remedy is available for those tenants who would hesitate to take such action without prior approval of an official agency.



subsection (2) denies them due process on numerous grounds. We address plaintiffs' due process claims first.

1. *Due Process.* Subdivision (a), subsection (2), allows a tenant to withhold the "full amount" of his periodic rent until the landlord's compliance with the ordinance is achieved. It provides further that "[i]n any action to recover possession based on nonpayment of rent, possession shall not be granted where the tenant has withheld rent in good faith under this Section."

a. *Reasonable Relationship to the Purpose of the Ordinance.* Plaintiffs first contend that the "extreme 'remedy' " of subsection (2) is not reasonably related to the purpose of the ordinance because it is available not only when a landlord charges excessive rents, but also when a landlord fails to register. As defendants observe, however, ensuring landlord registration is crucial to the purpose of the ordinance, because without registration the ordinance cannot be enforced.

Moreover, defendants note that all other enforcement remedies listed above except for subdivision (a), subsection (2), suffer the same serious weakness: to invoke them can cost substantial amounts of money, either to the tenant or to the Board. At the same time, the structure of the ordinance makes the question of funding crucial. Section 6, subdivision (n),[58] provides that funding for the Board's expenses shall be from annual landlord registration fees,[59] and not from the city's general fund. Therefore, defendants observe, the Board is

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[58] That subdivision provides in part: "The Board shall finance its reasonable and necessary expenses for its operation without the use of General Fund monies of the City of Berkeley except as stated in this subsection, by charging landlords an annual registration fee of twelve dollars ($12.00) per unit, per year in the first year of operation. After the first year, upon request by the Board the City Council may make reasonable annual adjustments in the fee. The Board is also empowered to request and receive funding when and if necessary, from any available source, except the City of Berkeley's General Fund, for its reasonable and necessary expenses, including but not limited to salaries and all other operating expenses."

[59] The annual registration fee for the first year of operation was $12 per unit. The city council, on request of the Board, may make reasonable annual adjustments in the fee. (Ibid.; see Baar, supra, 35 Rutgers L. Rev. at p. 763, table 5.1 [comparing funding provisions of various rent control ordinances].)

essentially dependent on landlords' registration fees to (i) pay the staff it needs to gather information for its general rent adjustment hearings under section 11; (ii) pay examiners to handle individual rent adjustment hearings under section 12; and (iii) employ counsel to bring suits under section 15, subdivisions (c) and (d), against landlords who refuse to register or who charge rents beyond the maximum allowed. On the other hand, defendants argue, the tenant-initiated remedies, with the exception of subdivision (a), subsection (2), cannot be relied on to enforce the ordinance. Although subdivision (a), subsection (1), permits a tenant to seek Board authorization to withhold rent, if landlords fail to register, the Board may lack funds to hire hearing examiners and other staff to hold hearings on such petitions. And, whereas subdivision (a), subsection (3), permits a tenant to sue for injunctive relief, there is no certainty that many tenants will expend the time or money to pursue that course. Finally, subdivision (a), subsection (4), permits a tenant to sue for damages when the landlord receives more than the maximum rent allowed by the ordinance; and subdivision (b) allows a tenant to sue for damages when the landlord violates certain restrictions on evictions: but neither section gives any remedy for the landlord's failure to register. Other provisions—section 11, subdivision (f), subsection (1)[60] and section 12, subdivision (f), subsection (1),[61] forbid a landlord who has failed to register—"after order of the Board-"—from taking advantage of general and individual rent increases allowed by the Board. But if landlords fail to register in significant numbers, the Board might be unable to hire the staff needed to assist in issuing the "orders" required by these two subsections.

Defendants thus proclaim the importance of the section 15, subdivision (a), subsection (2), rent withholding provision: it

[60] See *ante*, page *, footnote 44.

[61] That subdivision and subsection provide:
"f. No upward adjustment of an individual rent ceiling shall be authorized by the Board under this Section if the landlord:
"(1) Has continued to fail to comply, after order of the Board, with any provisions of this Ordinance and/or orders or regulations issued thereunder by the Board ...."
* *Infra* A-47.



suffers none of the "weaknesses" discussed above; it is claimed to be simple, direct, and self-enforcing. We conclude that defendants' rent withholding provision is reasonably related to achieving the legitimate purposes of the ordinance.

b. *Vagueness.* Plaintiffs next complain that section 15, subdivision (a), subsection (2), is unconstitutionally vague and overbroad. We will uphold the subsection against this challenge if it (1) gives fair notice of the practice to be avoided, and (2) provides reasonably adequate standards to guide enforcement. (*Connally* v. *General Const. Co.* (1926) 269 U.S. 385, 391; see generally Note, *The Void-for-Vagueness Doctrine in the Supreme Court* (1960) 109 U.Pa.L.Rev. 67; Note, *Due Process Requirements of Definiteness in Statutes* (1948) 62 Harv.L.Rev. 77.)

*(i) Fair Notice*

Fair notice, as applied to the present inquiry, requires only that the subsection's terms be described with a reasonable degree of certainty so that an ordinary landlord can understand what conduct is proscribed on his part, and under what conditions his rent-withholding tenant will be afforded a defense to an unlawful detainer action. (Cf. *Burg* v. *Municipal Court* (1983) 35 Cal.3d 257, 270-271 and cases cited.)

Plaintiffs contend that the subsection is ambiguous "as to the most basic components of the tenant's right to a remedy: who may take remedial action, in what amount and for how long"? We believe that the word "tenant" is clearly limited to a lessee, assignee or sublessee who has been charged excessive rent, or who lives in an unregistered apartment. Plaintiffs also claim the subsection is unclear as to who is to determine whether the landlord has violated the ordinance, and who is to determine when the landlord has achieved compliance. But we believe the answer is obvious: the trial court will determine these issues, if and when the landlord sues to evict for nonpayment of rent. Plaintiffs further claim that the subsection does not specify the amount of rent that may be withheld, but on its face the provision allows withholding "up to the full amount" of the tenant's periodic rent. Although such full withholding may be harsh, plaintiffs cannot successfully con-

tend that it is not rationally related to achieving compliance with the ordinance.

Finally, plaintiffs claim that the subsection "condemns the landlord to an indefinite sentence" because it does not specify when, if ever, the withheld rent shall be paid. To the contrary, subsection (2), read in conjunction with its introductory provision (subd. (a)), clearly establishes that the withholding remedy is allowed only until the landlord complies with the ordinance by registering and abiding by the maximum rent schedule that applies to him.[62] Nor do we accept plaintiffs' contention that the word "register" provides inadequate notice to landlords. That word, as well as the above terms and provisions, is sufficiently certain to inform landlords of both the conduct needed to comply with the subsection's requirements, and the circumstances that will afford his tenant a defense to an unlawful detainer action.

*(ii) Standards for Enforcement*

Plaintiffs also make a cryptic allegation that the subsection's withholding provision and the qualified defense it confers are dangerously susceptible of arbitrary "enforcement" by those who have the power to invoke it—the tenants. Their concern, apparently, is with the fact that application of the subsection hinges ultimately on a tenant's "good faith belief" that a landlord has failed to comply with the ordinance.

Contrary to plaintiffs' suggestion, however, the question of the applicability of subsection (2) is not contingent on the arbitrary or personal predilections of the tenant. (E.g., *Smith* v. *Goguen* (1974) 415 U.S. 566, 573.) Although the "good faith belief" required to invoke the provision is not a precisely measurable standard, neither is it incapable of reasonably exact determination. The determination of whether a tenant had the requisite good faith belief at the time he withheld rent is not to

[62] Indeed, the record contains the following regulation adopted by the Board on September 24, 1980: "The remedy of rent withholding provided to tenants under 15(a)(1) and 15(a)(2) shall not be construed to relieve the tenant of the obligation to pay whatever rent is subsequently deemed lawfully owed for the time period for which the rent was withheld. This rule shall be publicized and promulgated immediately."



be made by the tenant; it is instead a question for the trial court, to be decided only for the narrow purpose of establishing a defense to a landlord's eviction suit. Thus viewed in proper context, the provision poses little threat of arbitrary application, and hence is not properly subject to facial invalidation on this ground.

c. *Procedural Due Process and Confiscation.* Plaintiffs finally claim that the ordinance provides them no "due process protection" before their rents are "confiscated" pursuant to subdivision (a), subsection (2). Viewing application of the withholding provision in the proper context, however, discloses the false assumptions underlying plaintiffs' concern. As noted, the applicability of the withholding provision and the qualified defense it confers comes into question only after the landlord has initiated a wrongful detainer action. The provision affords the landlord no less due process protection than he would have normally; its sole effect is to create a substantive defense to eviction for nonpayment of rent if the tenant's withholding is found to have been made pursuant to a good faith belief that his landlord had not complied with the ordinance. Similarly, the provision produces no confiscatory result: it does not deprive the landlord of rent due, because, even if it is found that the tenant withheld in good faith, the landlord may sue and recover the full amount of back rent as soon as the court is persuaded that compliance with the ordinance has been achieved. On the other hand, if it is found that the tenant's withholding was not in good faith, the landlord may recover possession in unlawful detainer and may also sue for full back rent in an amount consistent with the ordinance. We conclude that, on the face of the ordinance, the withholding and qualified defense provisions of subdivision (a), subsection (2), neither deprive landlords of due process, nor do they produce confiscatory results. (Cal.Const., art. I, §7.) At most, the subsection creates a substantive defense to unlawful detainer actions as a means of ensuring compliance with the ordinance.

2. *Preemption.* Every California city possesses the general power to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal.Const., art. XI, §7.) In addition,

charter cities have even greater authority: they have exclusive power to legislate over "municipal affairs." (Cal. Const., art. XI, §5, subd. (a).)[63] Similar to the defendant city's concession in *Birkenfeld* that "rent control is not a municipal affair as to which a charter provision would prevail over general state law" (17 Cal.3d at p. 141), defendants now do not claim that provision for rent withholding in section 15, subdivision (a), is a municipal affair that overrides general state law. Instead, defendants assert their power to implement the rent withholding provision based on the right of all cities to regulate matters not in conflict with general laws. Thus, assuming without deciding that the ordinance's rent withholding provisions do not relate to a "municipal affair," we turn to whether defendants' regulation is in conflict with, and hence preempted by, state law. (Hiscocks & Backes, *Charter City Financing in California—A Growing "Statewide Concern"?* (1982) 16 U.S.F. L.Rev. 603, 613-614.)

Plaintiffs first claim that general law directly conflicts with the rent withholding provisions of subdivision (a). Alternatively, they insist that rent withholding is preempted by implication in light of three statutes that are asserted to occupy the field of "when rent is due." For both contentions, plaintiffs rely exclusively on Civil Code section 1947, which provides for the timing of the payment of rent if there is no usage or contract to the contrary;[64] Code of Civil Procedure section 1161,[65] which

[63] Article XI, section 5, subdivision (a) provides: "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith."

[64] That section states: "When there is no usage or contract to the contrary, rents are payable at the termination of the holding, when it does not exceed one year. If the holding is by the day, week, month, quarter, or year, rent is payable at the termination of the respective periods, as it successively becomes due."

[65] That section provides: "A tenant of real property . . . is guilty of unlawful detainer: 1. When he continues in possession . . . after the expiration of the term . . . . [¶] 2. When he continues in possession . . . after default in the payment of rent . . . . [¶] 3. When he continues in possession . . . after a neglect or failure to perform other conditions or covenants of the lease . . . ."



describes the circumstances under which a tenant is guilty of unlawful detainer; and Civil Code section 1942,[66] which identifies circumstances under which a tenant may withhold rent and utilize those funds to repair deficiencies rendering the premises untenantable.

Defendants respond that these sections have nothing to do with local rent withholding provisions designed to enforce local rent control; that the withholding provisions of the ordinance do not regulate when rent is due, but instead establish a substantive defense to unlawful detainer; and that plaintiffs' cited statutes cannot be interpreted to even address, much less fully occupy, that field. Furthermore, they claim *Birkenfeld* establishes that these provisions are not preempted by state law.

a. *Direct Conflict.* In *Birkenfeld* we responded to three preemption arguments. The plaintiffs in that case claimed preemption of (1) the field of "rent," (2) the field of defenses to eviction, and (3) the field of procedural requisites to a landlord filing an eviction action. We determined that the previous ordinance's requirement of a certificate of eviction by the rent control board before a landlord was allowed to commence unlawful detainer proceedings was invalid because such a requirement would "nullify the intended summary nature of the remedy." (17 Cal.3d 129, 151.) By contrast, however, we found that although there is "extensive state legislation governing many aspects of landlord-tenant relationships, some of which pertain specifically to the determination or payment of rent" (citing, inter alia, Civ. Code, §1942 and Civ. Code, §1947), "neither the quantity nor the content of these

[66] That section provides: "(a) If within a reasonable time after written or oral notice to the landlord or his agent, as defined in subdivision (a) of Section 1962, of dilapidations rendering the premises untenantable which the landlord ought to repair, the landlord neglects to do so, the tenant may repair the same himself where the cost of such repairs does not require an expenditure more than one month's rent of the premises and deduct the expenses of such repairs from the rent when due, or the tenant may vacate the premises, in which case the tenant shall be discharged from further payment of rent, or performance of other conditions as of the date of vacating the premises. This remedy shall not be available to the tenant more than twice in any 12-month period. . . . [¶] (d) The remedy provided by this section is in addition to any other remedy provided by this chapter, the rental agreement, or other applicable statutory or common law."

statutes establishes or implies any legislative intent to exclude municipal regulation of the amount of rent based on local conditions." (Id. at pp. 141-142; see *Galvan* v. *Superior Court* (1969) 70 Cal.2d 851, 860-864.)

More significant to the present question, we rejected the plaintiffs' claims that the field of defenses to eviction suits is preempted by general law. The former Berkeley ordinance limited permissible bases for eviction to specific enumerated grounds, but omitted a landlord's right to evict merely to terminate the tenancy. The ordinance thus prohibited eviction of a tenant "who [was] in good standing at the expiration of the tenancy unless the premises [were] to be withdrawn from the rental housing market or the landlord's offer of a renewal lease [had] been refused." (17 Cal.3d at p. 148.) Addressing the state law relevant to the issue, we observed that "Code of Civil Procedure section 1161, subdivision 1, makes the continuation of a tenant's possession after expiration of the term a form of unlawful detainer for which the landlord may recover possession in summary proceedings under Code of Civil Procedure section 1164 et seq. However, these statutory provisions are not necessarily in conflict with the charter amendment's provision forbidding landlords to recover possession upon expiration of a tenancy if the purpose of the statutes is sufficiently distinct from that of the charter amendment. (See *Galvan* v. *Superior Court, supra,* 70 Cal.2d 851, 859; *People* v. *Mueller, supra,* [1970] 8 Cal.App.3d 949, 954.) The purpose of the unlawful detainer statutes is procedural. The statutes implement the landlord's property rights by permitting him to recover possession once the consensual basis for the tenant's occupancy is at an end. In contrast *the charter amendment's elimination of particular grounds for eviction is a limitation upon the landlord's property rights under the police power, giving rise to a substantive ground of defense in unlawful detainer proceedings. The mere fact that a city's exercise of the police power creates such a defense does not bring it into conflict with the state's statutory scheme. Thus . . . the statutory remedies for recovery of possession and of unpaid rent* (see Code Civ. Proc., §§1159-1179a; Civ. Code, §1951 et seq.) *do not preclude a defense based on municipal rent control legislation enacted*



*pursuant to the police power imposing rent ceilings and limiting the grounds for eviction for the purpose of enforcing those rent ceilings."* (Id. at pp. 148-149 (emphasis added)), citing *Inganamort* v. *Borough of Fort Lee* (N.J. 1973) 303 A.2d 298, 307 and *Warren* v. *City of Philadelphia* (Pa. 1955) 115 A.2d 218, 221.)

We believe that the above-quoted language from *Birkenfeld* disposes of plaintiffs' claim that the rent withholding provision of the ordinance directly conflicts with Code of Civil Procedure section 1161. It is true that the tenant's good faith defense conferred under subdivision (a), subsection (2), effectively eliminates one ground for eviction, but as we observed in *Birkenfeld,* this exercise of the municipality's police power does not bring the provision into conflict with state law, because the statutory remedy for recovery of possession does not preclude limitations on grounds for eviction for the purpose of enforcing a local rent control regulation.

Furthermore, we are not persuaded that the ordinance conflicts with Civil Code sections 1942 or 1947. Neither statute involves the field of defenses to eviction, or enforcement of local rent control ordinances. Section 1942 is this state's "repair and deduct statute." It specifically allows rent withholding, under certain circumstances, in order for a tenant to make needed repairs. Section 1947 merely establishes rules relating to the date at which rent is due, depending on the term of a tenant's holding. We find nothing in either section that directly conflicts with the municipal legislation at issue here. We conclude, as did the Supreme Court of New Jersey in a similar context, that merely because defendants' ordinance "imposes restraints which the State law does not, does not spell out a conflict between State and local law. On the contrary the absence of a statutory restraint is the very occasion for municipal initiative. The police power is vested in local government to the very end that the right of property may be restrained when it ought to be because of a sufficient local need." (*Inganamort,* supra, 303 A.2d at p. 307.)

b. *Preemption by Implication.* We will be reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another. (*Gluck* v. *County*

*of Los Angeles* (1979) 93 Cal.App.3d 121, 133; Comment, *The California City Versus Preemption by Implication* (1966) 17 Hastings L.J. 603, 610.) Furthermore, the mere fact that all three of plaintiffs' cited statutes concern "rent" does not assist them because "[a] field cannot properly consist of statutes unified by a single common noun." (*Galvan,* supra, 70 Cal.2d 851, 862.) A potentially preemptive "field" of state regulation is "an area of legislation which includes the subject of the local legislation, and is sufficiently logically related so that a court, or a local legislative body, can detect a patterned approach to the subject." (Ibid.)

In re Hubbard (1964) 62 Cal.2d 119, we articulated three tests to determine in what circumstances chartered cities might be deprived of their supposed exclusive power to legislate in regard to "municipal affairs" pursuant to article XI, section 5 of our Constitution. (Id. at p. 128.) Although we subsequently declined to follow *Hubbard*'s approach to municipal affairs questions (*Bishop* v. *City of San Jose* (1969) 1 Cal.3d 56, 63, fn. 6), in *Galvan,* supra, we adopted *Hubbard*'s three tests as standards by which to judge preemption of municipal exercise of police powers pursuant to article XI, section 7. The *Hubbard* factors, reincarnated as a preemption test in *Galvan,*[67] establish that we may infer an intent to preempt defendants' legislation only if " '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; [or] (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.' " (70 Cal.2d at pp. 859-860, quoting *Hubbard,* supra, 62 Cal.2d at p. 128; see also *People ex rel. Deukmejian* v. *County of Mendocino* (1984) 36 Cal.3d 476, 485; *Palos Verdes Estates,* supra, 142 Cal.App.3d

[67] See Sato, *"Municipal Affairs" in California* (1972) 60 Cal.L.Rev. 1055, 1073, footnote 68 (*Galvan's* preemption analysis relies on that part of *Hubbard* relating to municipal affairs).



362, 373-374 [quoting and following *Galvan*]; *Gregory,* supra, 142 Cal.App.3d 72, 82 [quoting and following *Hubbard*]; *Bamboo Brothers* v. *Carpenter* (1982) 133 Cal.App.3d 116, 124 [same]; *Music Plus Four, Inc.* v. *Barnet* (1980) 114 Cal.App.3d 113, 123 [same]; *People* v. *Mueller* (1970) 8 Cal.App.3d 949, 953-954 [quoting and following both *Hubbard* and *Galvan*]; Comment, *Of Lawyers, Guns, and Money: Preemption and Handgun Control* (1982) 16 U.C. Davis L.Rev. 137, 150-165 [asserting that the *Hubbard* tests are the most widely used approach to the issue of implied preemption]; cf. Rossmann & Steel, *Forging the New Water Law: Public Regulation of "Proprietary" Groundwater Rights* (1982) 33 Hastings L.J. 903, 937-942 [analyzing implied preemption under the three *Hubbard/Galvan* tests].)

Applying these alternative tests, we must conclude that there is no full and complete state coverage of the field of rent withholding so as to "clearly indicate" that the field "has become exclusively a matter of state concern." Neither the quantity nor the content of plaintiffs' cited statutes suggests the Legislature's intent to occupy the field of rent withholding to the exclusion of municipally created defenses to unlawful detainer actions. Nor do the three statutes suggest that the field of rent withholding is clearly a subject of paramount state interest that cannot tolerate any local involvement. Indeed, we fail to discern how defendants' withholding provisions would frustrate state statutory schemes that relate to unlawful detainer procedures, repair and deduct remedies, or that define the duration of rental periods.

Finally, existence of defendants' provisions are likely to have very little effect on transient citizens, much less an effect that outweighs the local benefit to be derived from the withholding provisions. First, many transients will not be affected by the ordinance, because it does not apply to "hotels, motels, inns, tourist homes, and rooming or boarding houses" in which "transient guests" stay for 14 days or less. (§ 5, subd. (b).) Second, to the extent that transients might be affected, the withholding provision would likely have a positive effect, because it would help assure prospective newcomers that established maximum housing rents will be enforced.

We therefore conclude that section 15, subdivision (a), subsections (1) and (2), are not preempted by state law. The ordinance's provision authorizing rent withholding and establishing a qualified defense to unlawful detainer actions regulates a field of great importance to the effective operation of defendant's rent control scheme, and one which is distinct from any other state regulation. Even assuming that state regulations touch on rent withholding, we discern no legislative intent to preempt defendants' regulation.

The judgment is affirmed. The 1982 amendment to section 14, purporting to create a presumption affecting the burden of proof, is invalid. This provision is clearly severable. (§ 16.) All other provisions of the ordinance are valid and enforceable. Each party shall bear its own costs.

MOSK, J.

WE CONCUR: REYNOSO, J.
GRODIN, J.
*COOPERMAN, J.
*MILLS, J.

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* Assigned by the Chairman of the Judicial Council



## CONCURRING OPINION BY BIRD, C.J.

I agree with Part II of the majority opinion. I also agree with the substantive analysis of the antitrust issues in Part I. However, I write separately to raise a concern regarding the highly unusual manner in which the antitrust issues came before this court.

No mention of antitrust law was made by the litigants in the trial court or in the Court of Appeal below. The argument that federal antitrust law might render defendants' rent control ordinance invalid was first raised in this court, and then only *after* the decision had been made to grant a hearing. Moreover, that issue was raised by an amicus curiae rather than a party to the appeal.

A cautionary note should be sounded to dispel any belief that this court will routinely agree to address issues presented in this manner.

As the majority correctly note, the issue of whether a municipal regulation might be subject to antitrust scrutiny first arose in *Community Communications* v. *Boulder* (1982) 455 U.S. 40. *Boulder* was decided on January 13, 1982, a month *after* plaintiffs' closing brief had been filed in the Court of Appeal. Plaintiffs cannot, therefore, be faulted for failing to raise that issue in the trial court or in their opening and closing briefs in the Court of Appeal.

However, the Court of Appeal did not hear oral argument until July 5, 1983, a year and a half *after* the *Boulder* decision. During that entire period, neither plaintiffs nor amicus attempted to call the case to the lower court's attention—despite that court's willingness to permit additional briefing as evi-

denced by its acceptance as late as June 17, 1982, of a brief by amicus curiae for defendants. (See Cal. Rules of Court, rule 14(b).) The Court of Appeal was thus deprived of an opportunity to rule on that issue.

The Court of Appeal filed its now-vacated opinion on October 24, 1983. Defendants' petition for hearing was filed in this court on December 7, 1983, nearly two full years after *Boulder* was decided. Plaintiffs' answer to that petition, filed some two weeks later, *made no mention of Boulder or of the possible application of federal antitrust law to this case.* Hence, when this court granted the petition for hearing, it had not been apprised by either party that the case presented issues which, in the majority's words, would force the court to "wander off the map and travel cross country without the benefit of trail or compass." (Maj. opn., *ante,* at pp. - [typed maj. opn. at pp. 23-24].) The antitrust issues were first brought to the court's attention several weeks later when amicus curiae requested leave to file a brief in support of plaintiffs.

The majority assert that consideration of the antitrust issues is nevertheless proper under several well established principles. They correctly note that on appeal from a judgment granting or denying an injunction, a reviewing court will apply the law as it stands at the time its opinion is filed. (*Cal-Dak Co.* v. *Sav-On Drugs, Inc.* (1953) 40 Cal.2d 492, 496-497.) They also recite the familiar rule which permits a *party* to raise on appeal a new point of law decided while the appeal is pending. (*Claremont Imp. Club* v. *Buckingham* (1948) 89 Cal.App.2d 32,33.)

However, they do not explain why the same rule should apply where, as here, the new issue is raised not by a party but by an amicus. Nor do they explain the failure of plaintiffs and amicus to request permission to file a supplemental brief in the Court of Appeal raising the new point of law. This court, overriding another Court of Appeal, has held under similar circumstances that the filing by a party of a supplemental brief provides "a satisfactory basis for the unusual practice of considering a point raised for the first time after the opening briefs have been filed." (*Meier* v. *Ross General Hospital* (1968) 69 Cal.2d 420, 423-424, fn. 1.)



Finally, the majority cite several decisions in which this court has held that a *party* may raise a new issue on appeal if it is strictly one of law, based on undisputed facts and involving important questions of public policy. (Maj. opn., *ante,* at pp. - fn. 3 [*Infra* at A-5 to A-6].) Again, they fail to explain why the same rule should apply to an amicus curiae. More importantly, they fail to address the ramifications of permitting new issues to be raised by nonparties *after* a hearing has been granted in this court.[1]

" ' "[T]he rule is universally recognized that an appellate court will consider only those questions properly raised by the appealing parties. Amicus curiae must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered [citations]." ' " *Younger* v. *State of California* (1982) 137 Cal.App.3d 806, 813-814; see *E.L. White, Inc.* v. *City of Huntington Beach* (1978) 21 Cal.3d 497, 510,511; *Eggert* v. *Pacific States S. & L. Co.* (1943) 57 Cal.App.2d 239, 251.)[2]

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[1] None of the cases cited by the majority involved an attempt by an amicus curiae to raise a new issue on appeal, nor does it appear that the new issues were first raised after a hearing had been granted. (*Frink* v. *Prod* (1982) 31 Cal.3d 166, 170; *Carman* v. *Alvord* (1982) 31 Cal.3d 318, 323; *UFITEC, S.A.* v. *Carter* (1977) 20 Cal.3d 238, 249, fn. 2; *Wong* v. *Di Grazia* (1963) 60 Cal.2d 525, 532, fn. 9, 535-541; *Tyre* v. *Aetna Life Ins. Co.* (1960) 54 Cal.2d 399, 405; *Burdette* v. *Rollefson Construction Co.* (1959) 52 Cal.2d 720, 725-726.)

In *Carman* v. *Alvord, supra,* 31 Cal.3d 318, several amici joined the parties in urging this court to resolve an issue first raised on appeal. (*Id.,* at p. 324.) However, the issue had been *raised* by the defendant city in its responsive brief in the Court of Appeal. (*Id.,* at p. 323.) This court concluded that the issue was properly before it under an exception to the rule that "on appeal a *litigant* may not argue theories for the first time [ ]." (*Id.,* at p. 324, emphasis added.)

[2] Several exceptions have been recognized, none of which is applicable in the setting of the present case. (See *E. L. White, Inc.* v. *City of Huntington Beach, supra,* 21 Cal.3d at p. 511 [issue raised by amicus curiae considered because, on appeal from a judgment of dismissal following the sustaining of a general demurrer without leave to amend, court was required to affirm judgment if correct on any theory; appeal also presented a question of jurisdictional dimension]; cf. *People* v. *Coleman* (1942) 53 Cal.App.2d 18, 32 ["ignoring" general rule to permit amicus curiae to raise new objection to jury instructions in criminal appeal].)

*(Footnotes continued on following page)*

In *Younger*, the appellant attempted in his reply brief in the Court of Appeal to adopt as his own an issue first presented by an amicus curiae. The Court of Appeal refused to address the issue, reasoning that amicus had no standing to raise it and that the appellant had failed to show good reason for his failure to present the point in his opening brief. (*Younger* v. *State of California*, *supra*, 137 Cal.App.3d at pp. 812-814.)

The present case presents striking similarities. While plaintiffs cannot be faulted for failing to raise the antitrust issues in their opening brief in the Court of Appeal, their failure to raise them in a supplemental brief or in oral argument is unexcused. Nor do they explain their failure to raise the point in the answer to the petition for hearing, even though the legal grounds for doing so had by then existed for nearly two years.

On the basis of the arguments presented in the petition and the answer, this court voted to grant a hearing. Subsequently, amicus curiae requested leave to file its brief presenting the antitrust issues. Only then did plaintiffs jump on the bandwagon. By that time, of course, it was too late for the court to consider the possible bearing of the additional issues on its determination whether or not to grant a hearing.[3]

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*(Footnotes continued from preceding page)*

Another exception is presented by an automatic appeal from a judgment imposing a penalty of death. In an automatic appeal, this court has a statutory duty to examine the complete record to determine whether the defendant was given a fair trial. (*People* v. *Stanworth* (1969) 71 Cal.2d 820, 833; Pen. Code, § 1239, subd. (b).) Accordingly, an amicus will be permitted to raise a new issue bearing on that question. (People v. Easley (1983) 34 Cal.3d 858, 863-864 [rehearing granted to consider issues raised by amicus curiae after initial decision filed but before the opinion became final].)

[3] In this respect, the problem presented here differs from the one confronting the Court of Appeal in *Younger*. With certain exceptions, this court has discretion as to which cases it will hear. The Courts of Appeal, again with minor exceptions, must rule on all duly filed appeals from final judgments and appealable orders. (See Cal. Const., art. VI, §§ 11, 12; Cal. Rules of Court, rules 28, 29; Code Civ. Proc., § 901 et seq.; 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 30, p. 4045.) Hence, this court has an additional basis for insisting upon timely notification of the issues posed by an appeal.



I do not know, of course, whether the vote on the petition for hearing in the present case might have been different had the court been apprised that additional issues were lurking in the shadows. However, I submit that in many cases the decision to grant or deny hearing might be heavily influenced by the court's awareness or lack of awareness of such issues—and rightly so.

This court grants only a small percentage of the petitions for hearing filed each year. Petitioners faced with that fact naturally make every attempt to present the issues posed in their appeal in the most favorable light. Troublesome or time consuming secondary issues which were argued in the courts below may be deemphasized or omitted entirely from the petition for hearing. The court is able in these instances to review the briefs filed in the Court of Appeal and the lower court's opinion to identify such hidden issues and consider them in deciding whether a hearing is advisable.[4]

Where, as here, an issue that could have been raised in the Court of Appeal is not raised until after that court has filed its opnion and after a hearing has been granted, this court is hindered in two important ways from performing its responsibilities most effectively. First, the court is denied the opportunity to consider whether hearing should be denied in light of the additional issue. Second, assuming that a hearing would have been granted in any event, the court is deprived of the lower court's views on the issue.

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[4] On May 6, 1985, this particular problem will be lessened considerably when a recently approved amendment to the California Constitution takes effect. (Cal. Const., art. VI, § 12, as adopted Nov. 6, 1984.) The amendment will permit this court, inter alia, to review only those issues which it considers most important in a case and leave intact the lower court's decision on all other issues. (See Legislative Analyst's Analysis, Ballot Pamp., Proposed Amend. to Cal. Const., Supreme Court: Transfer of Causes and Review of Decisions, Gen. Elec. (Nov. 6, 1984) p. 28.)

Accordingly, both parties and amici[5] should bear a heavy burden in this court when they attempt, after a hearing has been granted, to raise an issue which they could have raised earlier. The burden should be especially great where the issue could have been raised before the decision of the Court of Appeal became final as to that court. In all but the rarest cases, this court should refuse to consider a new issue that has been raised in such a belated manner. Otherwise, amici control the issues this court considers and decides—a most curious method of appellate review.

BIRD, C. J.

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[5] The burden of satisfying the requirements for timely presentation of issues should be added to that of overcoming the well established general rule which bars amici from raising new issues on appeal. (See *ante*, at p. [*Infra* at A-77].)



## DISSENTING OPINION BY LUCAS, J.

I respectfully dissent.

In my view, and without considering any of the other substantial objections raised by plaintiff landlords, the Berkeley rent control ordinance is invalid because it calls for the fixing of maximum rents in violation of federal antitrust law (Sherman Antitrust Act, 15 U.S.C. § 1). Indeed, the ordinance would appear to constitute a per se illegal price-fixing scheme routinely condemned by the federal courts. Accordingly, we should declare the ordinance a *nullity*, as mandated by the supremacy clause of the United States Constitution. (Art. VI, § 2.)

As I will demonstrate, a municipality's participation in, or approval of, a price-fixing scheme should not shield it from antitrust scrutiny. If such a scheme indeed constitutes a per se violation of the Sherman Antitrust Act, then an irreconcilable conflict exists between the municipal ordinance and federal antitrust policy which voids the ordinance under supremacy principles. (See *Rice* v. *Norman Williams Co.* (1982) 458 U.S. 654, 659-661.) Such a conflict is presented here.

### I. Antitrust Scrutiny of Municipal Activity: the Background

Not every state or local governmental activity having anticompetitive effects is invalid under the Sherman Antitrust Act. Thus in *Parker* v. *Brown* (1943) 317 U.S. 341, the United States Supreme Court held that the federal antitrust laws do not preclude anticompetitive programs adopted and enforced *by the states* as a matter of state policy. (*Id.*, at pp. 351-352.) This "state action" exemption does not extend, however, to a state's local political subdivisions (such as Berkeley) unless the state has "clearly articulated and affirmatively expressed" the anticompetitive policy being implemented by the local entity.

(*Community Communications Co.* v. *City of Boulder* (1982) 455 U.S. 40, 54 [hereafter *Boulder*]; see also *Lafayette* v. *Louisiana Power & Light Co.* (1978) 435 U.S. 389, 410 [plurality opn.].) In short, as *Boulder* established, cities, like private entities, " 'Must obey the antitrust laws.' " (455 U.S. at p. 57, quoting the *Lafayette* plurality.)

It is uncontradicted that the California Legislature has not directly spoken on the subject of rent control, much less "clearly articulated and affirmatively expressed" any policy favoring local ordinances such as Berkeley's. Defendants assert that the requisite "state policy" is evidence by legislation calling upon local governments to assist in providing a "decent home and suitable living environment for every California family." (Health & Saf. Code, §§ 50003, 50005.) The Legislature has expressly qualified that state policy, however, by declaring that nothing in the division which contains the foregoing provisions "shall authorize the imposition of rent regulations or controls" (with exceptions not applicable here). (*Id.*, § 50202.) Similarly, the "local planning" policy of the state (Gov. Code, §§ 65100-65761) provides that "[n]othing in this article shall be construed to be a grant of or a repeal of any authority which may exist of a local government to impose rent controls . . . ." (*Id.*, § 65589, subd. (b).) Such neutrality on the part of the state is plainly insufficient to insulate Berkeley's ordinance from antitrust scrutiny. (*Boulder*, supra, 455 U.S. at p. 55.)

## II. Antitrust Scrutiny of Berkeley's Ordinance

The Berkeley rent control ordinance is *unquestionably* an anticompetitive price-fixing scheme—it imposes maximum ceilings on rents charged by private landlords. And had Berkeley's landlords privately agreed to fix maximum rents, their scheme would have been severely and speedily punished, for maximum pricing by private entities has been consistently condemned as *per se illegal* under the so-called "per se" price-fixing rule. (*Arizona* v. *Maricopa County Medical Society* (1982) 457 U.S. 332 [hereafter *Maricopa*]; *Albrecht* v. *Herald Co.* (1968) 390 U.S. 145; *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.* (1951) 340 U.S. 211.) Does it make a difference that the price-fixing scheme attacked here is municipally sponsored?



Some cases indicate that, in determining whether to apply the "per se illegal" label to a particular restraint or scheme, we should undertake a limited inquiry into the "pernicious effects" and "redeeming virtues," if any, inherent in the challenged program. (*Continental T.V., Inc.* v. *GTE Sylvania Inc.* (1977) 433 U.S. 36, 50; *Northern Pac. R. Co.* v. *United States* (1958) 365 U.S. 1, 5; see also *Broadcast Music Inc.* v. *Columbia Broadcasting System, Inc.* (1979) 441 U.S. 1, 19-20.) Other cases seem to support the idea that such an inquiry is unnecessary where a maximum price-fixing scheme is involved. (See generally *Maricopa,* supra [per se rule applied to invalidate maximum pricing arrangement in health care plan].) In any event, as I explain, Berkeley's rent control ordinance clearly has "pernicious" anticompetitive effects without any overriding "redeeming virtues."

### a. Anticompetitive effects

Economists are virtually unanimous in their condemnation of rent control laws. (E.g., Baird, *Rent Control: The Perennial Folly* (1980) pp. 54-78; *Rent Control, A Popular Paradox* (The Fraser Institute edit. 1975) [essays by nine economists]; Muth, *Redistribution Income Through Regulation in Housing* (1983) 32 Emory L.J. 691, 698; see also Rabin, *The Revolution in Residential Landlord-Tenant Law* (1984) 69 Cornell L.Rev. 517, 555 [quoting Ludwig von Mises' conclusion that governmental attempts to fix the price of a commodity make conditions worse].) In the view of most of these economists, rent control schemes cause what a Supreme Court plurality has called "serious economic dislocation." (See *Lafayette*, supra, 435 U.S. at pp. 412-413.)

For example, Professor Milton Friedman, writing in collaboration with Professor George Stigler, observed that "Rent ceilings, therefore, cause haphazard and arbitrary allocation of space, inefficient use of space, retardation of new construction and indefinite continuance of rent ceilings, or subsidisation of new construction and a future depression in residential building. Formal rationing by public authority would probably make matters worse." (Friedman & Stigler, *Roofs or Ceilings? The Current Housing Problem,* in *Rent Control, A Popular Paradox,* supra, p. 100.)

In addition, rent control measures bring about the very evils that have prompted the United States Supreme Court's condemnation of private maximum-price arrangements. Rent control laws cripple the economic freedom of landlords and thereby restrain their ability to sell housing in accordance with their own best judgment exercised in light of market conditions. (See *Kiefer-Stewart*, supra, 340 U.S. at p. 312.) Moreover, maximum rents may be fixed too low to encourage, or even permit, landlords to furnish services or facilities deemed necessary or desirable by their tenants. (See *Albrecht*, supra, 390 U.S. at pp. 152-153.) Where is the competitive incentive under a rent control scheme?

As previously indicated, just as maximum pricing of goods and services generally discourages entry into the market (see *Maricopa*, supra, 457 U.S. at p. 348), maximum rents have a negative impact on the production of new housing (Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws* (1984) 69 Cornell L.Rev. 604, 609-610; Siegan, *Commentary on Redistribution of Income Through Regulation in Housing*, supra, 32 Emory L.J. 721, 723), thereby inevitably putting an upward pressure on price as demand increases. In sum, the pernicious effects on the competitive market are many, apparent, and long-standing.

**B. Redeeming Virtues**

Does rent control have any "redeeming virtues" which would override its anticompetitive effects? Berkeley points to alleged public welfare features which supposedly justify rent control. As I indicated above, if landlords privately agreed to fix maximum rents, their scheme *unquestionably* would be struck down as per se illegal despite asserted socially "redeeming" features, such as, for example, the financial boon to their tenants. In the private sphere, "redemption" is limited to a showing of offsetting procompetitive gains—effects on *competition* are the sole and governing consideration in such cases. (*National Society of Prof. Engineers* v. *United States* (1978) 435 U.S. 679, 690-696; see also *Continental T.V.*, supra, 433 U.S. at pp. 57-58.) Does it make a difference that a city, rather than a landlord, is claiming redeeming features unrelated to competition? I certainly can see no logic in such a proposition.



To allow a local governmental entity to excuse a price-fixing scheme on the basis of asserted public health, safety or welfare considerations would enmesh the courts in an impossible task of weighing the "apples" of social welfare with the "oranges" of antitrust policy. (See *Boulder*, supra, 455 U.S. at p. 67 [dis. opn. of Rehnquist, J.].)

Municipalities very well may be able to justify their anticompetitive programs under certain limited circumstances not involved here. Perhaps a city can point to a factor such as the existence of a "natural monopoly" (e.g., a unique resource such as a natural harbor) which requires price regulation. (See 3 Areeda & Turner, Antitrust Law (1978) ¶ 621b, at pp. 50-51; see also *Omega Satellite Prods. Co.* v. *City of Indianapolis* (7th Cir. 1982) 694 F.2d 119, 127 [natural monopoly in cable television].) Other justifications doubtless exist. But dissatisfaction with the price level attained through lawful and open competition, i.e., through the normal operation of the free enterprise system, cannot justify anticompetitive price restraints of the kind imposed here. Otherwise, there would exist no practical limits whatever on the authority of a municipality to tamper with the price structure established by the open market.

Price competition is the "central nervous system of the [free market] economy." (*United States* v. *SoconyVacuum Oil Co.* (1940) 310 U.S. 150, 226, fn. 59.) Price fixing, whether privately or publicly inspired, thus endangers the free economic system to which Congress has entrusted the prosperity of the entire nation. If our 38,500 county, municipal and township governments (Bureau of the Census, Statistical Abstract of the United States (1984) at p. 294) with their broad authority for general governance "were free to make economic choices . . . without regard to their anticompetitive effects, a serious chink in the armour of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." (*Lafayette*, supra, 435 U.S. at p. 408 [plurality opn., fn. omitted].)

In my view, then, the City of Berkeley's belief that, in essence, rents were too "high" in relation to the city's tenants' ability to pay would not constitute an excuse for tampering with

the free market mechanism, nor would the resultant decreased rents amount to a "redeeming virtue" overriding the anticompetitive effects of rent control. Accordingly, the ordinance was per se illegal under the Sherman Antitrust Act and should be declared invalid on that basis.

## III. The Majority's Four-Part Test

Although the challenged ordinance contemplates a per se illegal price-fixing scheme under the foregoing analysis, I observe that its invalidity would be apparent even under the majority's own novel test, an approach involving a "more accommodating standard" than the per se rule would require. (*Ante*, p. ____ [*Infra* at A-21].)

The majority acknowledges that Berkeley's ordinance would be unacceptable if "equally effective" and "less intrusive" alternative means were available to accomplish the same result. (*Ante*, p. ____ [*Infra* at A-35].) Yet isn't it evident that such alternative means indeed exist? If the city fathers (and mothers) believe that rents are too high in Berkeley, several solutions come to mind which would be more consistent with the operation of the free market system. *Rent subsidies* may be provided to needy tenants. *Public housing projects* may afford additional rental units. Property may be municipally acquired through *negotiated purchase or condemnation*. (See, e.g., Gov. Code, §§ 37350 [city may purchase and hold real property for common benefit]; 37350.5 [eminent domain]; Health & Saf. Code, §§ 50735-50743 [programs for low-income rental housing].)

In short, given the foregoing alternatives, why should competition between Berkeley's landlords be stifled in order to provide for the social welfare of Berkeley's tenants? Surely the "less intrusive," and "equally effective" method of accomplishing this end would be to spread the financial burden among *all* city taxpayers.



## IV. Conclusion

The federal antitrust laws have been called the Magna Carta of the free market system. (*United States* v. *Topco Associates, Inc.* (1972) 405 U.S. 596, 610.) These laws are as important to the preservation of market freedom as the Bill of Rights is to the protection of individual liberties. (*Ibid.*) Consistent with the overriding principle of supremacy of federal law (U.S. Const., art. VI, § 2), we should declare null and void the Berkeley rent control law at issue here.[1]

I would reverse the judgment and remand the case for further proceedings addressed to the antitrust issue.[2]

LUCAS, J.

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[1] Plaintiffs herein seek a declaratory judgment and injunctive relief to enjoin operation of the ordinance. Although the issue of available remedies in a federal court action was left open in *Boulder*, supra, 457 U.S. at page 56, footnote 20, I assume that relief in state court cases such as this is limited to declaratory and injunctive relief and would preclude recovery of damages. (see *Rice* v. *Norman Williams, Co.*, supra, 458 U.S. at p. 658, fn.4.)

[2] Application of the antitrust laws requires factual and legal determinations regarding the existence of "concerted activity" and a substantial effect upon interstate commerce. Although my view of the record suggests that both elements exist here, I would not object to a remand limited to these issues.

FILED
OCT 24 1983
Court of Appeal—First App. Dist.
CLIFFORD C. PORTER, Clerk
By ..... DEPUTY

## APPENDIX B

## IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
## FIRST APPELLATE DISTRICT, DIVISION FIVE

ALEXANDRA FISHER et al.,
*Plaintiffs and Appellants,*
v.
THE CITY OF BERKELEY et al.,
*Defendants and Respondents.*

**A010460**
**1 Civ. 52332**
**Sup.Ct.No. 536602-6**

In this case we hold that a rent control ordinance is unconstitutional because of inherent procedural delays in rent adjustment when it precludes consideration of the rate of return to the landlord in authorizing general adjustments in rent ceilings and requires an individual petition for this factor to be considered. This results in an inexcusably cumbersome rent adjustment procedure not reasonably related to the ordinance's stated purposes of preventing unwarranted rent increases and therefore deprives landlords of due process of law. We also hold that the subject of the rights of tenants to withhold rent is preempted by state law.

Appellants (landlords) filed a complaint for injunctive and declaratory relief against the City of Berkeley, the Berkeley City Council, and the Berkeley Rent Stabilization Board (Berkeley), challenging the validity of the Berkeley "Ordinance Adopting a Rent Stabilization and Eviction for Good Cause Program" (hereafter "Measure D") enacted by initiative on June 3, 1980. The complaint alleged that Measure D was invalid both on its face and as applied to landlords.



Measure D is a comprehensive rent control ordinance affecting some 28,000 Berkeley rental units. It creates a Rent Stabilization Board (Board), requires that landlords register each rental unit and pay an annual registration fee (upon which the Board is solely dependent for funding), establishes base rent ceilings, provides for annual general adjustments and individual adjustments of rent ceilings, prohibits evictions except upon good cause, and prescribes remedies for violations of its provisions.

The trial court granted Berkeley's motion for judgment on the pleadings, declaring Measure D to be valid both on its face and as applied. The court rendered judgment without leave to amend as to the claim of facial invalidity, but granted landlords thirty days leave to amend as to the claim that the ordinance was invalid as applied. Landlords filed an amended complaint, but subsequently dismissed it voluntarily. Our decision, therefore, is limited to the landlords' claim that Measure D is facially invalid and we do not consider the claim that the measure is invalid as applied.

The parties have briefed and argued the validity of several separate provisions of Measure D. The primary dispute is whether a rent control ordinance is constitutional if it provides a landlord is to receive a "fair return on investment" rather than a reasonable return on the value of the property. In *Cotati Alliance for Better Housing* v. *City of Cotati, post,* page 280, we have determined that a return on investment standard is not unconstitutional. It is therefore unnecessary to discuss this issue here. We limit our consideration of Measure D to the other issues presented.

The first contention we consider is landlords' challenge to subdivisions (d) and (e) of section 12 of Measure D. Those provisions preclude the Rent Stabilization Board from authorizing an individual rent incease because of increased interest or other expenses resulting from sale or refinancing of rental property if the landlord could reasonably have foreseen that such increased expenses could not be covered by the existing rent schedule (except where refinancing is necessary to make capital improvements or in cases of individual hardship to

buyers).[1] Landlords contend these provisions constitute unreasonable restraints on alienation (i.e., will inhibit sales at a fair market value) in violation of Civil Code section 711, which declares that "Conditions restraining alienation, when repugnant to the interest created, are void."

Landlords' argument ignores subdivision (i) of section 12, which provides that "No provision of this Ordinance shall be applied so as to prohibit the Board from granting an individual rent adjustment that is demonstrated necessary by the landlord to provide the landlord with a fair return on investment." This safety valve overrides all other provisions of the ordinance and averts any danger that subdivisions (d) and (e) might prevent a purchaser from realizing a fair return, and thus prevents any unreasonable restraint on alienation. (See generally *Wellenkamp* v. *Bank of America* (1978) 21 Cal.3d 943, 948.)

More to the point, Civil Code section 711 does not apply to municipal ordinances. The rule against restraints on alienation "is directed against provisions in contracts or conveyances. It has no application to disabling restraints established by express statute or by the operation of rules of law; e.g., the incapacity of a minor or insane person to transfer land, or restrictions on the power of a trustee." (3 Witkin, Summary of Cal. Law (8th ed.

[1] Subdivisions (d) and (e) of section 12 provide in full:

d. No individual upward adjustment of a rent ceiling shall be authorized by the Board by reason of increased interest or other expenses resulting from the landlord's refinancing the rental unit if, at the time the landlord refinanced, the landlord could reasonably have foreseen that such increased expenses could not be covered by the rent schedule then in existence, except where such refinancing is necessary for the landlord to make capital improvements which meet the criteria set forth in Section 12.c.(3). This paragraph shall only apply to that portion of the increased expenses resulting from the refinancing that were reasonably foreseeable at the time of the refinancing of the rental unit and shall only apply to rental units refinanced after the date of adoption of this Ordinance.

e. Except for cases of individual hardship as set forth in Subsection 12.i of this Ordinance, no individual upward adjustment of a rent ceiling shall be authorized by the Board because of the landlord's increased interest or other expenses resulting from the sale of the property, if at the time the landlord acquired the property, the landlord could have reasonably foreseen that such increased expenses would not be covered by the rent schedule then in effect. This Subsection (12.e) shall only apply to rental units acquired after the date of adoption of this Ordinance.



1973) Real Property, § 314, p. 2024; accord, 4 Rest. Property, pp. 2377, 2381.) Thus Measure D cannot violate Civil Code section 711.

Landlords assert an equal protection challenge to section 5, subdivision (f), of Measure D. When Measure D was passed, this provision exempted from the ordinance's application "Rental units in a residential property which is divided into a maximum of four (4) units where one of such units is occupied by the landlord as his/her principal residence," but limited the exemption to "rental units that would have been exempt under the provisions of this Ordinance had this Ordinance been in effect on December 31, 1979."[2] Landlords challenge subdivision (f) to the extent that it excludes from the exemption any property that became owner-occupied after December 31, 1979.

As Berkeley points out, however, the challenged exclusion bears a debatable rational relationship to the purposes of Measure D. The Berkeley electorate could reasonably have determined that the exclusion was desirable to prevent certain landlords from avoiding application of Measure D by evicting tenants and moving into their rental property after the provisions of the proposed ordinance became known. Landlords argue that any landlords so disposed would already have taken such measures, since rental property of four or less units was already exempt from rent control by the terms of a prior ordinance (the "Temporary Rent Stabilization Ordinance," passed by the Berkeley City Council effective December 30, 1979), but this response ignores the fact that Measure D was far more comprehensive than its predecessor. Because the challenged distinction is supported by a debatable rational basis, the equal protection challenge must be rejected. (*Minnesota* v. *Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 464; *New Orleans* v. *Dukes* (1975) 427 U.S. 297, 303; *Hale* v. *Morgan* (1978) 22 Cal.3d 388, 395.)

[2] This subdivision was amended by the Berkeley "Tenants Rights Amendment Act of 1982" to limit the exemption to rental property divided into two units.

Landlords challenge certain portions of section 14 of Measure D. Section 14 prohibits retaliation against a tenant for the assertion or exercise of rights under the ordinance. The challenged provisions, when enacted, stated that in an action by the landlord to recover possession or in an affirmative action taken by the tenant for damages, "evidence of the assertion or exercise by the tenant of rights under this Ordinance within six months prior to the alleged acts of retaliation shall create a presumption that the landlord's act was retaliatory. 'Presumption' means that the Court must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence." Subsequent to the trial court's judgment in this case the latter sentence was amended by the Berkeley "Tenants Rights Amendment Act of 1982" to read, " 'Presumption' means that the Court must find the existence of the fact presumed unless and until its nonexistence is proven by a preponderance of the evidence."

Landlords contend that the pre-amendment presumption was a presumption affecting the burden of proof, and as such was preempted by the Evidence Code. Berkeley claims there was no preemption because the presumption was one affecting the burden of producing evidence.

As previously indicated, only the facial validity of Measure D is challenged. The 1982 modification of section 14 renders the issue as to the validity of the former presumption moot. (*Callie* v. *Board of Supervisors* (11969) 1 Cal.App.3d 13, 18; *Jordan* v. *County of Los Angeles* (1968) 267 Cal.App.2d 794, 799; 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 466, p. 4421.) The 1982 amendment changing the challenged presumption to one affecting the burden of proof may be preempted by state law, but this issue is not presently before us.

Landlords claim it was procedurally improper for the court to grant judgment on the pleadings, because this denied them the opportunity to present evidence as to their claims of confiscation, denial of equal protection, and unlawful restraint on alienation. This argument lacks merit. On a defense motion for judgment on the pleadings, all facts alleged in the complaint are deemed admitted. (*Sullivan* v. *County of Los Angeles*



(1974) 12 cal.3d 710, 714-715 fn. 3; *Colberg, Inc.* v. *State of California ex rel. Dept of Pub. Wks.* (1967) 67 Cal.2d 408, 411-412, cert. den. (1968) 390 U.S. 949.) There was no need for landlords to present any evidence. Landlords claim that judgment on the pleadings denied them a declaration as to facial invalidity, but the judgment expressly declared that Measure D is "valid on its face." It is well established that a motion for judgment on the pleadings "may be used in an action for declaratory relief to obtain a *declaratory judgment on the merits in favor of the defendant* rather than a dismissal of the plaintiff's suit." (4 Witkin, Cal. Procedure (2d ed. 1971), Proceedings Without Trials, § 161, p. 2817 (emphasis in original.) Landlords claim they should have been granted leave to amend their complaint, but any amendment to make further factual allegatous would only be applicable to the claim that the ordinance was invalid *as applied.* Landlords were granted leave to amend as to this claim (although they later dismissed the amended complaint).

We note for the record that as a result of discussion at oral argument of a point not discussed in the briefs, we vacated submission in this case in order to receive Berkeley's concession that the term "fair return on investment" in sections 12(c) and 12(i) (pertaining to individual rent adjustments) may reasonably be interpreted to permit the Board to consider and allow for any decrease in the purchasing power of the return due to inflation. As landlords stated in reply to that concession, "Although demonstrating the city's recognition of a serious defect in the Ordinance, the concession does nothing to correct it. The Ordinance freezes rents (and thus returns) at their May 1980 levels and contains no adequate procedural mechanism whereby landlords can obtain rent adjustments to offset losses due to inflation." Landlords' comments are well taken.

Measure D contains two methods by which rent ceilings can be adjusted. In section 11, providing for annual general adjustments of rent ceilings, Measure D precludes the Board from granting citywide rent increases except to offset certain

increases in costs.[3] Because of this prohibition within the ordinance, despite Berkeley's concession, the Board in making general adjustments does not have the power to consider factors (e.g., inflation) affecting the landlords' return on investment such as we discussed in our decision in *Cotati Alliance for Better Housing* v. *City of Cotati, post,* pages 294-296.

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[3] Section 11 provides in full:

(a) Once each year, the Board shall consider setting and adjusting the rent ceiling for all rental units covered by this Ordinance in general and/or particular categories of rental units covered by this Ordinance deemed appropriate by the Board. The Board shall hold at least two public hearings prior to making any annual general adjustment of the rent ceilings. The first such public hearing shall be conducted no later than October 31, 1980, and the first annual general adjustment shall be made no later than December 31, 1980.

(b) In making annual general adjustments of the rent ceiling, the Board shall:

(1) Adjust the rent ceiling upward by granting those landlords who pay for utilities a utility adjustment for increases in the City of Berkeley for utilities.

(2) Adjust the rent ceiling upward by granting landlords a property tax, maintenance and operating expenses increase adjustment (exclusive of utilities) for increases in the City of Berkeley for property taxes and maintenance and operating expenses.

(3) Adjust the rent ceiling downward by requiring landlords to decrease rents for any decreases in the City of Berkeley for property taxes.

In adjusting rent under this subsection, the Board shall adopt a formula or formulas of general application. This formula will be based upon a survey or other available data indicating increases or decreases in the expenses in the City of Berkeley set forth in this subsection. For maintenance and operating expense adjustments, the Board may also use survey data from surrounding communities where appropriately the Board shall make no more than one annual adjustment of rent ceilings per rental units per year.

(c) An upward general adjustment in rent ceilings does not automatically provide for a rent increase. Allowable rent increases pursuant to a general upward adjustment shall become effective only after the landlord gives the tenant at least a thirty (30) days written notice of such rent increases and the notice period expires.

(d) If the Board makes a downward general adjustment in the rent ceilings, landlords of rental units to which this adjustment applies shall give tenants of such rental units written notice of the rent decrease to which they are entitled. Such rent decreases shall take effect not later than thirty (30) days after the effective date set by the Board for the downward general adjustment.

*(Footnotes continued on following page)*



The other method by which rent ceilings may be adjusted is provided by section 12 of Measure D, which provides for individual petitions for adjustment of rent ceilings. In setting forth the factors to be considered by the Board in acting upon such individual petitions, Measure D specifically provides that among the factors to be considered is the "landlord's rate of return on investment."[4]

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*(Footnotes continued from preceding page)*

(e) If the maximum allowable rent specified under this Ordinance for a rental unit is greater than the rent specified for such unit in the rental agreement, the lower rent specified in the rental agreement shall be the maximum allowable rent until the rental agreement expires. If the maximum allowable rent specified under this Ordinance for a rental unit is less than the rent specified for such unit in the rental agreement, the lower rent specified under this Ordinance shall be the maximum allowable rent.

(f) No rent increase pursuant to an upward general adjustment of a rent ceiling shall be effective if the landlord:

(1) Has continued to fail to comply, after order of the Board, with any provisions of this Ordinance and or orders or regulations issued thereunder, or

(2) Has failed to bring the rental unit into compliance with the implied warranty of habitability.

[4] Section 12, subdivision (c), provides in full:

"In making individual adjustments of the rent ceiling, the Board or the hearing examiner shall consider the purposes of this Ordinance and shall specifically consider all relevant factors, including (but not limited to):

(1) Increases or decreases in property taxes;

(2) Unavoidable increases or any decreases in maintenance and operating expenses;

(3) The cost of planned or completed capital improvements to the rental unit (as distinguished from ordinary repair, replacement and maintenance) where such capital improvements are necessary to bring the property into compliance or maintain compliance with applicable local code requirements affecting health and safety, and where such capital improvements costs are properly amortized over the life of the improvement;

(4) Increases or decreases in the number of tenants occupying the rental unit, living space, furniture, furnishings, equipment, or other housing services provided, or occupancy rules,

(5) Substantial deterioration of the controlled rental unit other than as a result of normal wear and tear;

(6) Failure on the part of the landlord to provide adequate housing services, or to comply substantially with applicable state rental housing laws, local housing, health and safety codes, or the rental agreement;

(7) The pattern of recent rent increases or decreases;

*(Footnotes continued on following page)*

Thus to obtain a rent adjustment and have any consideration given to the effects of inflation on the landlords' rate of return on investment, there must be a petition by each landlord on an individual basis. Such a procedure for adjusting maximum rents is "constitutionally insufficient to relieve landlords from confiscatory rent levels . . ." (*Birkenfeld* v. *City of Berkeley* (1976) 17 Cal.3d 129, 167.)

The requirement of an individual petition to ameliorate the effects of inflation is the same type of requirement upon which the court in *Birkenfeld* held unconstitutional a predecessor Berkeley rental control ordinance requiring "drastically and unnecessarily restricts the rent control board's power to adjust rents, thereby making inevitable the arbitrary imposition of unreasonably low rent ceilings. It is clear that if the base rent for all controlled units were to remain as the maximum rent for an indefinite period many or most rent ceilings would be or become confiscatory. For such rent ceilings of indefinite duration an adjustment mechanism is constitutionally necessary to provide for changes in circumstances and also provide for . . . situations in which the base rent cannot reasonably be deemed to reflect general market conditions. The mechanism is sufficient for the required purpose only if it is capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary. 'Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them . . .' (*Smith* v. *Illinois Bell Tel. Co.* (1926) 270 U.S. 587, 591 [70 L.Ed. 747,

*(Footnotes continued from preceding page)*

(8) The landlord's rate of return on investment. In determining such return, all relevant factors, including but not limited to the following shall be considered: the landlord's actual cash down payment method of financing the property, and any federal or state tax benefits accruing to landlord as a result of ownership of the property;

(9) Whether or not the property was acquired or is held as a long-term or short-term investment; and

(10) Whether or not the landlord has received rent in violation of the terms of this Ordinance or has otherwise failed to comply with the Ordinance.

It is the intent of this Ordinance that individual upward adjustments in the rent ceilings on units be made only when the landlord demonstrates that such adjustments are necessary to provide the landlord with a fair return on investment.



749, 46 S.Ct. 408] (enjoining enforcement of telephone rates because of unreasonable delay in acting upon application for rate increase.).) The charter amendment is constitutionally deficient in that it withholds powers by which the rent control board could adjust maximum rents without unreasonable delays and instead require the Board to follow an adjustment procedure which would make such delays inevitable." (*Birkenfeld* v. *City of Berkeley, supra,* 17 Cal.3d at p. 169.) The same is true here: Measure D is deficient in that it withholds powers by which the Board could adjust rents without unreasonable delay to account for inflation.

As a result, "regardless of how inequitable any rent ceiling may be under all of the circumstances, it cannot be adjusted except by a procedure that inherently and unnecessarily precludes reasonable prompt action except perhaps for a lucky few. [¶] . . . The delays in rent adjustment with which we are concerned stem not from any anticipated dereliction of duty on the part of the rent control board, but from defects in the charter amendment itself." (*Id.*, at p. 172.)

We hold that "the inexcusably cumbersome rent adjustment procedure is not reasonably related to the amendment's stated purpose of preventing excessive rents and so would deprive plaintiff landlords of due process of law if permitted to take effect." (*Id.*, at p. 173.) Thus, for reasons identical to those expressed by the Supreme Court in *Birkenfeld* in invalidating the predecessor Berkeley rent control ordinance, we find Measure D to be invalid on its face, not because of its objectives, but because the procedures impose heavy burdens upon landlords not reasonably related to the accomplishment of its objectives.

The purpose of rent control must be to assure fair treatment of both tenants and landlords. In our free enterprise system, the landlord should not be responsible for subsidizing rents to the extent that expenses cannot be recovered and a fair and reasonable profit cannot be received. Although Measure D would permit harm caused by inflation to be addressed by individual petitions to the Board, it suffers from the same deficiencies as its predecessor in that delays in considering and

acting upon individual petitions would inevitably cause delays in providing a fair return to the landlord and would therefore be confiscatory.[5]

We now turn to landlords' final contention, challenging the provisions of section 15, subdivisions (a)(1) and (a)(2), which allow a tenant, either upon Board authorization (subdivision (a)(1)) or on the tenant's own initiative and belief (subdivision (a)(2)) to withhold all or part of the rent if the landlord charges excessive rents or fails to register the unit, until compliance with the ordinance is achieved.[6] Landlords contend that the rent withholding provisions are preempted by state law.[7]

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[5] It is conceivable that the filing fee charged for individual petitions, in circumstances where a factor such as insufficient rate of return on investment is common to all landlords, might itself be prohibitive and therefore unconstitutional.

[6] Subdivision (a) of section 15 provides in pertinent part:

a. *For violation of Rent Ceilings or Failure to Register.* If a landlord fails to register in accordance with section 8 of this Ordinance, or if a landlord demands, accepts, receives or retains any payment in excess of the maximum allowable rent permitted by this Ordinance, a tenant may take any or all of the following actions until compliance is achieved:

(1) A tenant may petition the Board for appropriate relief. If the Board, after the landlord has proper notice and after a hearing, determines that a landlord has wilfully and knowingly failed to register a rental unit covered by this Ordinance or violated the provisions of Sections 10, 11 and 12 of this Ordinance, the Board may authorize the tenant of such rental unit to withhold all or a portion of the rent for the unit until such time as the rental unit is brought into compliance with this Ordinance. After a rental unit is brought into compliance, the Board shall determine what portion, if any, of the withheld rent is owed to the landlord for the period in which the rental unit was not in compliance. Whether or not the Board allows such withholding, no landlord who has failed to comply with the Ordinance shall at any time increase rents for a rental unit until such unit is brought into compliance.

(2) A tenant may withhold up to the full amount of his or her periodic rent which is charged or demanded by the landlord under the provisions of this Ordinance. In any action to recover possession based on nonpayment of rent, possession shall not be granted where the tenant has withheld rent in good faith under this Section . . . .

[7] Berkeley contends that the challenge to subdivision (a)(2) is not justiciable because that provision involves only tenant action and no tenants were named as defendants here. But in an action for declaratory relief the court can consider "other problems" which would otherwise have required a different type of pleading (*Mackay* v. *Whitaker* (1953) 116 Cal.App. 2d 504, 509-510) in order to avoid piecemeal litigation (*Beeler* v. *Plastic Stamping,*

*(Footnotes continued on following page)*



The court in *Birkenfeld* v. *City of Berkeley, supra,* 17 Cal.3d at pp. 141-142, held that local regulation of amounts of rent payable is not preempted by state legislation. Landlords contend that, in contrast, state legislation pertaining to *when* rent is due preempts the withholding provisions of subdivisions (a)(1) and (a)(2) of section 15, by virtue of both direct statutory conflict and full occupation of the field. *Birkenfeld* did not deal with this issue.

We hold that the challenged provisions of section 15 are preempted by general laws intended fully to occupy the field of regulation as to when rent is due, to the exclusion of municipal regulation. In addition to Civil Code section 1947 which provides for the timing of the payment of rent if there is no usage or contract to the contrary, other state action has occurred in this area.[8] The Legislature has provided in Code of Civil Procedure section 1161 that a tenant is guilty of unlawful detainer when the tenant continues in possession "after default in the payment of rent." Even more to the point, in Civil Code section 1942 the Legislature has identified circumstances under which a tenant may withhold rent and utilize those funds to repair deficiencies rendering the premises untenable which the landlord has failed to repair. The Legislature specifically provided in section 1942 that this remedy would not be available to the tenant more than twice in any twelve month period and set forth the procedures under which this withholding of rent may be authorized.

Further, subdivision (d) of section 1942 provides that the withholding remedy "is in addition to any other remedy provided by this chapter, the rental agreement, or other appli-

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*(Footnotes continued from preceding page)*

*Inc.* (1956) 144 Cal.App. 2d 306, 309; *Byrd* v. *Mutual Benefit H. & A. Assn.* (1946) 73 Cal.App. 2d 457, 465). Further, the defendant City of Berkeley (through the electorate) granted tenants the unilateral right to withhold; any doubts as to the sufficiency of naming the city as a defendant—and hence the justiciability of the controversy—are to be resolved in favor of present adjudication. (See *California Water & Telephone Co.* v. *County of Los Angeles* (1967) 253 Cal.App. 2d 16, 26.)

[8] Civil Code section 1947 provides:

"When there is no usage or contract to the contrary rents are payable at the termination of the holding, when it does not exceed one year. If the holding is by the day, week, month, quarter, or year, rent is payable at termination of the respective periods, as it successfully becomes due."

cable statutory or common law," to the exclusion of municipal remedies. Thus in addition to contributing to a body of statutory law that we believe is intended fully to occupy the field of regulation as to when rent is due, the latter provision of section 1942 suggests a direct conflict with municipal ordinances permitting the withholding of rent.

For the foregoing reasons, the provisions of Measure D contained in section 15, subdivisions (a)(1) and (a)(2), allowing a tenant to withhold all or part of the rent, cannot be sustained.

Measure D contains a severability clause.[9] However, as the Supreme Court found in ruling that Berkeley's predecessor rent control ordinance was unconstitutional, "there appears no way of severing the invalid limitations on the Board's powers to adjust maximum rents from the remainder of the charter amendment. The constitutional defect cannot be cured simply by excision but only by additional provisions that are beyond our power to provide. (*Dillon* v. *Superior Court* (1971) 4 Cal.3d 860, 871 [94 Cal.Rptr. 777, 484 P.2d 945].)" (*Birkenfeld* v. *City of Berkeley, supra,* 17 Cal.3d at p. 173.)

The judgment is reversed.

King, J.

We concur:

Low, P. J.

Haning, J.

A010460/1 Civ. 52332

[9] Section 16 of the ordinance provides:
"If any provision of this Ordinance or application thereof is held to be invalid, this invalidity shall not effect other provisions or applications of this Ordinance which can be given effect without the invalid provisions or applications, and to this end the provisions and applications of this Ordinance are inseverable."



ENDORSED
FILED
AUGUST 21, 1980
RENE C. DAVIDSON, County Clerk
By Rhoda N. Payne, Deputy

## APPENDIX C

DOBBS & NIELSEN
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**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF ALAMEDA**

ALEXANDRA FISHER, an individual;
MARGUERITE JACOBS, an individual;
MORT BAKER, an individual;
RICHARD LAWHORN, an individual;
ANTHONY KERSHAW, an individual
and LEVIN-ZEMEL, a corporation;
on behalf of themselves and
all others similarly situated;
*Plaintiffs,*

v.

THE CITY OF BERKELEY, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY RENT STABILIZATION BOARD;
DOES I through XX, inclusive,
*Defendants.*

**NO. 536602-6**

**TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE**

It appearing to the satisfaction of the court, upon the reading of the verified Complaint and declarations of plaintiffs, and the Points and Authorities submitted in support thereof, that the case therein presented is a proper case of issuance of an Order to Show Cause and a Temporary Restraining Order and that unless a Temporary Restraining Order issues plaintiffs will suffer irreparable injury before the matter can be heard on notice; now therefore:

IT IS HEREBY ORDERED that THE CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE CITY COUNCIL OF BERKELEY; and the BERKELEY RENT STABILIZATION BOARD appear on September 11, 1980, at 2 p.m., before this Court in Department 1, at the Courthouse, to show cause, if any they have, why a preliminary injunction should not issue restraining each of them and all persons acting on their behalf, from enforcing or attempting to enforce directly or indirectly, the Berkeley "Rent Stabilization And Eviction For Good Cause" Ordinance ("the Ordinance") in its entirety, or alternatively

(i) from enforcing sections 12(d), 12(e), 14, and 15;

(ii) from enforcing any part of the Ordinance with respect to buildings with 4 or less units one of which is owner-occupied; and

(iii) from enforcing or attempting to enforce the Ordinance, and particularly sections 12(c) and (i), in any way that denies owners rent increases necessary to provide a fair return on the equity (market value less secured indebtedness) in their property as of July 1, 1980.

IT IS FURTHER ORDERED that defendants and each of them, and all persons acting on their behalf be restrained pending the hearing of this Order to show Cause from:

(i) enforcing or attempting to enforce sections (a)(1) and (a)(2) of the ordinance;

DATED: August 21, 1980

ALLEN E. BROUSSARD

Judge of the Superior Court



ENDORSED
FILED
OCTOBER 9, 1980
RENE C. DAVIDSON, County Clerk
By Judy Burdick Deputy

## APPENDIX D

## IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

## FOR THE COUNTY OF ALAMEDA

ALEXANDRA FISHER, an individual et al.,

*Plaintiffs,*

v.

CITY OF BERKELEY, et al.,

*Defendants.*

No. 536 602 6
PRELIMINARY INJUNCTION

The application of plaintiffs for preliminary injunction came on regularly for hearing before the court on September 26, 1980 pursuant to an Order to Show Cause issued by this Court on August 21, 1980. Plaintiffs appeared by counsel James R. Parrinello, Esq.; defendants appeared by counsel Myron Moskovitz, Esq.

Good cause appearing therefore,

IT IS ORDERED that during the pendency of this action the defendants, and each of them, and their officers, agents, employees, representatives, and all persons acting in concert or participating with them, shall be and they are hereby enjoined and restrained from enforcing or attempting to enforce, directly or indirectly, section 15(a)(2) of the Berkeley "Rent Stabiliza-

tion and Eviction for Good Cause" Ordinance. Except as otherwise stated herein, the application for preliminary injunction is denied.

The court reserves jurisdiction to modify this injunction as the ends of justice may require.

DATED: October 9, 1980

ALLEN E. BROUSSARD
JUDGE OF THE SUPERIOR COURT



## APPENDIX E

## IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ALAMEDA

ALEXANDRA FISHER, an individual, et al.,
*Plaintiffs,*
v.
CITY OF BERKELEY, et al.,
*Defendants.*

**No. 536 602 6**
**JUDGMENT ON THE PLEADINGS**

**[filed October 10, 1980]**

The motion of Defendants City of Berkeley for judgment on the pleadings came on regularly for hearing, before the Court on October 6, 1980, the Honorable Donald P. McCullum, Judge presiding. Plaintiffs appeared by counsel James P. Parrinello, Esq.; Defendants appeared by counsel Myron Moskovitz, Esq. The matter having been orally argued and the Court having considered the pleadings, documents, and papers on file, the matter having been submitted for decision, and good cause appearing therefor

IT IS ORDERED, ADJUDGED AND DECREED:

1. That judgment on the pleadings in favor of Defendant City of Berkeley is granted as to the First Cause of Action for declaratory relief on the ground that said cause of action fails to state facts sufficient to state a cause of action, as Ordinance Measure D is Constitutional and valid on its face, and judgment is ordered without leave to amend.

2. That judgement on the pleadings in favor of Defendant City of Berkeley is granted as to the First Cause of Action for declaratory relief on the ground that said cause of action fails to state facts sufficient to state a cause of action, as Ordinance Measure D is Constitutional and valid as applied, and judgment is ordered with thirty days leave to amend.

3. The Court further declares that all parties are obligated to perform and comply with Ordinance Measure D as enacted.

4. That judgment on the pleadings in favor of Defendant City of Berkeley is granted as to the Third Cause of Action for an injunction against enforcement of Ordinance Measure D, and said preliminary injunction or temporary restraining order is vacated, dissolved and set aside, and judgment may be entered denying injunctive relief from enforcement of Ordinance Measure D.

5. That judgment on the pleadings in favor of Defendant City of Berkeley is granted as to the Third Cause of Action for injunction against waste of public funds, and any injunction or restraining orders are vacated, and judgment may be entered denying injunctive relief as prayed in the Third Cause of Action.

6. That judgment on the pleadings in favor of Defendant City of Berkeley is granted as to the Fourth Cause of Action for injunctive relief from enforcement of Ordinance Measure D until compliance with the California Environmental Quality Act, on the grounds that said cause of action fails to state facts sufficient to state a cause of action, and judgment is ordered without leave to amend.

Dated: October 6, 1980 and
Signed: October 10, 1980

DONALD P. McCULLUM
JUDGE OF THE SUPERIOR COURT



## APPENDIX F

NIELSEN, HODGSON, PARRINELLO & MUELLER
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*Attorneys for Plaintiffs and Appellants*

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

ALEXANDRA FISHER, an individual;
MARGUERITE JACOBS, an individual;
MORT BAKER, an individual;
RICHARD LAWHORN, an individual;
ANTHONY KERSHAW, an individual;
and LEVIN-ZEMEL, INC., a corporation
*Plaintiffs and Appellants,*

v.

THE CITY OF BERKELEY,
a municipal corporation,
THE BERKELEY CITY COUNCIL,
THE BERKELEY RENT STABILIZATION BOARD; DOES I through XX, inclusive,
*Defendants and Appellees.*

**S.F. 24675**
**NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

**[filed March 18, 1985]**

NOTICE IS HEREBY GIVEN: That Alexandra Fisher, Marguerite Jacobs, Mort Baker, Richard Lawhorn, Anthony Kershaw, and Levin-Zemel, Inc., the plaintiffs and appellants herein, hereby appeal to the Supreme Court of the United States from the final judgment of this Court entered on December 27, 1984.

This appeal is taken pursuant to Section 1257(2) of Title 28 of the United States Code.

DATED: March 18, 1985.

NIELSEN, HODGSON, PARRINELLO & MUELLER
JAMES R. PARRINELLO, Esq.
JOHN E. MUELLER, Esq.
CHRISTIANE T. RIESS, Esq.
PETER J. DONNICI, Esq.

By _____
James R. Parrinello
*Attorneys for Plaintiffs and Appellants*



## APPENDIX G

## TENANTS RIGHTS AMENDMENTS ACT OF 1982[1]

BE IT ORDAINED by the People of the City of Berkeley as follows:

### PART A. TITLE AND PURPOSE

*This Ordinance shall be known as the Tenants Rights Amendments Act of 1982. The purposes of this Act are to further the purposes of the Rent Stabilization and Eviction for Good Cause Ordinance, as originally enacted on June 3, 1980 and to correct weaknesses found, in practice, in sections of that Ordinance. This Act is meant to amend those sections in order to help ensure that tenants' rights are protected.*

### PART B. AMENDMENTS

*Ordinance 5261-N.S., titled Rent Stabilization and Eviction for Good Cause Ordinance, shall be amended as follows:*

**Section 1.** TITLE.

This Ordinance shall be known as the Rent Stabilization and Eviction for Good Cause Ordinance.

**Section 2.** FINDINGS.

a. The Housing Element of the Berkeley Master Plan of 1977 states that:

(1) Berkeley residents have the right to decent housing in pleasant neighborhoods which meet standards of adequacy at a range of prices they can afford. (Goal 1)

---

[1] The Berkeley Rent Stabilization and Good Cause for Eviction Ordinance was originally enacted on June 3, 1980. In 1982, while this case was pending in the California Court of Appeal, the Berkeley voters enacted the "Tenants' Rights Amendments Act of 1982" revising certain limited sections of the Ordinance. The revised version is reproduced in this appendix. The decision of the California Supreme Court is based on the amended Ordinance. *See* footnote 2 of the Court's opinion at page A-4, *supra*. Provisions added by the amendment are italicized; provisions deleted from the original version are reproduced but crossed out.

(2) Existing housing should be maintained and improved. (Goal 2)

(3) Berkeley should have an adequate supply of housing throughout the City for persons with special needs. (Goal 3)

(4) All residents should have equal access to housing opportunities, financing and insurance on a nondiscriminatory basis. (Goal 4)

b. On June 6, 1972, the electorate of the City of Berkeley passed a Rent Control Charter Amendment that was later voided by the California Supreme Court as being unconstitutional.

c. On June 5, 1973, the City Council declared the existence of a housing emergency in the City of Berkeley, based upon the Council's finding of a pattern of steadily rising rents, a shortage of decent housing and an increased deterioration of the existing housing stock in the City.

d. On November 7, 1978, the electorate of the City of Berkeley passed a Renter Property Tax Relief Ordinance.

e. On October 25, 1979, the Berkeley City Council, Berkeley Housing Authority, the Berkeley Housing Advisory and Appeals Board, and members of the City's administrative staff held a public workshop regarding the current housing conditions in Berkeley.

f. On October 30, 1979, January 26, 1980 and February 21, 1980, the Berkeley City Council held public hearings at which members of the public expressed their views regarding current housing conditions in Berkeley and legislative proposals for rent stabilization and eviction controls.

g. The most significant provisions of the 1978 Renter Property Tax Relief Ordinance expired on December 30, 1979.

h. On November 27, 1979, the Berkeley City Council passed an ordinance establishing a Temporary Rent Stabilization Program, effective until June 30, 1980.



**Section 3.** PURPOSE.

The purposes of this Ordinance are to regulate residential rent increases in the City of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the City of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of the City with regard to low and fixed income persons, minorities, students, handicapped, and the aged.

**Section 4.** DEFINITIONS.

a. **BOARD:** The term "Board" refers to the appointed Rent Stabilization Board established by this Ordinance.

b. **COMMISSIONERS:** The members of the Board are denominated Commissioners.

c. **HOUSING SERVICES:** Housing services include but are not limited to repairs, maintenance, painting, providing light, hot and cold water, elevator service, window shades and screens, storage, kitchen, bath and laundry facilities and privileges, janitor services, refuse removal, furnishing, telephone, parking and any other benefit, privilege or facility connected with the use or occupancy of any rental unit. Services to a rental unit shall include a proportionate part of services provided to common facilities of the building in which the rental unit is contained.

d. **LANDLORD:** An owner of record, lessor, sublessor or any other person or entity entitled to receive rent for the use or occupancy of any rental unit, or an agent, representative or successor of any of the foregoing.

e. **RENT:** The consideration, including any deposit, bonus, benefit or gratuity demanded or received for or in connection with the use or occupancy of rental units and housing services. Such consideration shall include, but not be limited to, monies and fair market value of goods or services rendered to or for the benefit of the landlord under the rental agreement.

f. **RENTAL AGREEMENT:** An agreement, oral, written or implied, between a landlord and a tenant for use or occupancy of a rental unit and for housing services.

g. **RENTAL UNIT:** Any unit in any real property, including the land appurtenance thereto, rented or available for rent for residential use or occupancy (including units covered by the Berkeley Live/Work Ordinance No. 5217-N.S.), located in the City of Berkeley, together with all housing services connected with use or occupancy of such property such as common areas and recreational facilities held out for use by the tenant.

h. **PROPERTY:** A parcel of real property which is assessed and taxed as an undivided whole.

i. **TENANT:** Any renter, tenant, subtenant, lessee or sublessee of a rental unit, or successor to a renter's interest, or any group of tenants, subtenants, lessees, or sublessees of any rental unit, or any other person entitled to the use or occupancy of such rental unit.

j. **SKILLED NURSING FACILITY:** A health facility or a distinct part of a hospital which provides the following basic services: skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis. It provides 24 hour inpatient care and, as a minimum, includes medical, nursing, dietary, pharmaceutical services and an activity program. The facility shall have effective arrangements, confirmed in writing, through which services required by the patients, but not regularly provided within the facility can be obtained promptly when needed.

k. **HEALTH FACILITY:** Any facility, place or building which is organized, maintained and operated for the diagnosis, care and treatment of human illness, physical or mental, including convalescence and rehabilitation and including care during and after pregnancy, or for any one or more of these purposes, for one or more persons, to which such persons are admitted for a 24 hour stay or longer.



l. **RECOGNIZED TENANT ORGANIZATION:** Any group of tenants, residing in rental units in the same building or in different buildings operated by the same management company, agent or landlord, which requests to be so designated.

m. **RENT CEILING:** The maximum allowable rent which a landlord may charge on any rental unit covered by this Ordinance.

n. **BASE RENT CEILING:** The maximum allowable rent established under Section 10 of this Ordinance.

o. **FEES:** A fee, for the purpose of this Ordinance, is a charge fixed by law for services of public officers or for use of a privilege under control of government.

**Section 5.** APPLICABILITY.

This Ordinance shall apply to all real property which is being rented or is available for rent for residential use in whole or in part, except for the following:

a. Rental units which are owned by any government agency. However, the exemption of units owned by the Berkeley Housing Authority from the terms of this Ordinance shall be limited to their exemption from the terms of Section 8, Rent Registration; Section 10, Establishment of Base Rent Ceiling and Posting; Section 11, Annual General Adjustment of Rent Ceilings; and Section 12, Individual Adjustments of Rent Ceilings, of this Ordinance.

b. Rental units which are rented primarily to transient guests for ~~a period of~~ *use or occupancy* less than fourteen (14) *consecutive* days in establishments such as hotels, motels, inns, tourist homes, and rooming and boarding houses. *However, the payment of rent every fourteen (14) days or less shall not by itself exempt any unit from coverage by this Ordinance.*

c. Rental units in nonprofit cooperatives owned and controlled by a majority of the residents.

d. Rental units leased by the Berkeley Housing Authority under the Section 23 program (42 U.S.C. Section 1421b) or rental units leased to tenants assisted under the Section 8 program (42 U.S.C. Section 1437f). However, except as may

be preempted by state or federal law, the exemption of such rental units from the terms of this Ordinance shall be limited to Section 8, Rent Registration; Section 10, Establishment of Base Rent Ceiling and Posting; Section 11, Annual General Adjustment of Rent Ceilings and Section 12, Individual Adjustments of Rent Ceilings, of this Ordinance.

e. Rental units in any hospital, skilled nursing facility, health facility, asylum, or nonprofit home for the aged.

f. Rental units in a residential property which is divided into a maximum of four (4) units where one of such units is occupied by the landlord as his/her principal residence. Any exemption of rental units established under this subsection (5.f.) shall be limited to rental units that would have been exempt under the provisions of this Ordinance had this Ordinance been in effect on December 31, 1979.

*After July 1, 1982, this exemption shall no longer apply to rental units in a residential property which is divided into three (3) or four (4) units. It shall continue to apply to rental units in a residential property which is divided into two (2) units, and which meet all the other requirements of this subsection (5.f.) Rental units which become non-exempt under this provision shall have the provisions of subsections 8.i. and 10.c. applied to them.*

g. A rental unit in a residential property where the landlord shares kitchen or bath facilities with the tenant(s) of such rental unit and where the landlord also occupies a unit in the same property as his/her principal residence.

h. For the purposes of Subsections 5.f. and 5.g., the term landlord shall be defined only as the owner of record holding at least fifty (50) percent interest in the property.

i. New constructed rental units which are completed and offered for rent for the first time after the effective date of this Ordinance, provided that such new units were not created as a result of rehabilitation or conversion as opposed to new construction. However, the exemption of such newly constructed units shall be limited to their exemption from the terms of



Section 8, Rent Registration; Section 10, Establishment of Base Rent Ceiling and Posting; Section 11, Annual General Adjustment of Rent Ceilings; and Section 12, Individual Adjustments of Rent Ceilings, of this Ordinance.

**Section 6.** RENT STABILIZATION BOARD.

a. **COMPOSITION:** There shall be in the City of Berkeley a Rent Stabilization Board; the Board shall consist of nine (9) appointed Commissioners. The Board shall elect annually as chairperson one of its members to serve in that capacity.

b. **ELIGIBILITY:** Residents of the City of Berkeley are eligible to serve as Commissioners on the Board.

c. **FULL DISCLOSURE OF HOLDINGS:** All commissioners shall file with the City Clerk a verified statement listing all of their interests and dealings in real property, including but not limited to ownership, sale, management, transfer or exchange, and interests in entities whose primary purpose is the ownership, sale, management, transfer or exchange of real property during the previous three years. Such statements shall be made available for public inspection.

d. **APPOINTMENT OF COMMISSIONERS:** Commissioners shall be appointed by members of the Berkeley City Council in accordance with the Fair Representation Ordinance (No. 4780-N.S.), within thirty (30) days after the adoption of this Ordinance.

e. **TERM OF OFFICE:** Commissioners' terms of office shall be in accordance with the Fair Representation Ordinance (City of Berkeley Ordinance No. 4780-N.S.).

f. **POWERS AND DUTIES:** The Board shall have the following powers and duties:

(1) Set the rent ceilings for all rental units.

(2) Require registration of all rental units under Section 8.

(3) Publicize the manner in which the Base Rent Ceiling is established under Section 10.

(4) To make adjustments in the rent ceiling in accordance with Sections 11 and 12.

(5) Set rents at fair and equitable levels in view of and in order to achieve the purposes of this Ordinance.

(6) To issue orders, rules and regulations, conduct hearings and charge fees as set forth below.

(7) Make such studies, surveys and investigations, conduct such hearings, and obtain such information as is necessary to carry out its powers and duties.

(8) Report annually to the City Council of the City of Berkeley on the status of rental housing units covered by this Ordinance.

(9) Request the City Council to remove rent controls under Section 6.q.

(10) Administer oaths and affirmation and subpoena witnesses and relevant documents.

(11) Establish rules and regulations for settling civil claims under Section 15.

(12) Seek injunctive relief under Section 15.

(13) Pursue civil remedies in courts of appropriate jurisdiction.

(14) Intervene as an interested party in any litigation brought before a court of appropriate jurisdiction by a landlord or tenant with respect to rental units covered by this Ordinance.

(15) Hold public hearings.

(16) Other powers necessary to carry out the purposes of this Ordinance which are not inconsistent with the terms of this Ordinance.

(17) Except as provided in Section 6.n. of this Ordinance, the Board shall finance its reasonable and necessary expenses for its operation without the use of General Fund monies of the City of Berkeley.



g. **RULES AND REGULATIONS:** The Board shall issue and follow such rules and regulations, including those which are contained in this Ordinance, as will further the purposes of this Ordinance. The Board shall publicize its rules and regulations prior to promulgation in at least one newspaper of general circulation in the City of Berkeley.

All rules and regulations and relevant documents explaining the decisions, orders, and policies of the Board shall be kept in the Board's office and shall be available to the public for inspection and copying.

The Board shall publicize this Ordinance so that all residents of Berkeley will have the opportunity to become informed about their legal rights and duties under this Ordinance. The Board shall prepare a brochure which fully describes the legal rights and duties of landlords and tenants under this Ordinance. The brochure shall be made available to the public.

h. **MEETINGS:** The Board shall hold regularly scheduled meetings. Special meetings shall be called at the request of at least a majority of the Commissioners of the Board. The Board shall hold its initial meeting no later than July 15, 1980.

i. **QUORUM:** Five (5) Commissioners shall constitute a quorum for the Board.

j. **VOTING:** The affirmative vote of five (5) Commissioners of the Board is required for a decision, including all motions, rules, regulations, and orders of the Board.

k. **COMPENSATION:** The Rent Stabilization Board shall be a working Board. In order to compensate Commissioners for their time and work performed as required by this Ordinance, Commissioners shall receive five dollars per hour, but in no case shall compensation for any one Commissioner exceed three thousand dollars in the first twelve month period or in any subsequent annual period that the Board is in operation for services rendered. Procedures and regulations for accounting for hours worked and compensation shall be developed and adopted by the Board and filed with the City Clerk.

Upon request by the Board the City Council may annually adjust the hourly compensation rate and the maximum annual sum received by the Commissioners.

l. **DOCKETS:** The Board shall maintain and keep in its office all hearing dockets, which shall be available for public inspection.

m. **VACANCIES:** If a vacancy shall occur on the Board, a qualified person to fill such vacancy shall be appointed in accordance with this Ordinance and the Fair Representation Ordinance (No. 4780-N.S.).

n. **FINANCING:** The Board shall finance its reasonable and necessary expenses for its operation without the use of General Fund monies of the City of Berkeley except as stated in this subsection, by charging landlords an annual registration fee of twelve dollars ($12.00) per unit, per year in the first year of operation. After the first year, upon request by the Board the City Council may make reasonable annual adjustments in the fee. The Board is also empowered to request and receive funding when and if necessary, from any available source, except the City of Berkeley's General Fund, for its reasonable and necessary expenses, including but not limited to salaries and all other operating expenses.

Notwithstanding the preceding provision of this Section, the City Council of the City of Berkeley shall appropriate as a loan to the Rent Stabilization Board sufficient funds for the reasonable and necessary expenses of the Board during the six month period following the adoption of this Ordinance, said funds to be repaid to the City by the Rent Stabilization Board within one year's period following the adoption of this Ordinance.

o. **STAFF:** The City Manager is authorized to employ and pay staff for the Board, including hearing examiners and inspectors, as may be necessary to perform the Board's functions efficiently in order to fulfill the purposes of this Ordinance.

p. **REGISTRATION:** The Board shall require the registration of all rental units covered by this Ordinance as provided for in Section 8. The Board may also require landlords to provide current information supplementing their registration statements.



q. **DECONTROL:** If the annual average vacancy rate for all rental units in the City of Berkeley exceeds five (5) percent over a six month period, the City Council is empowered, upon request by the Board, at its discretion and in order to achieve the purposes of this Ordinance, to exempt rental units covered by this Ordinance from Sections 8, 10, 11, and 12 of this Ordinance. In determining the vacancy rate for the City of Berkeley the Board and the City Council shall consider all available data and may conduct their own survey. If units are exempted pursuant to this Subsection (6.q.) coverage shall be reimposed if the City Council finds that the average annual vacancy rate has thereafter fallen below five (5) percent. Prior to any decision to exempt or renew coverage for rental units under this Subsection (6.q.) the Board shall hold at least two public hearings.

r. **CONFLICT OF INTEREST:** Commissioners shall not necessarily be disqualified from exercising any of their powers and duties on the grounds of a conflict of interest solely on the basis of their status as a landlord or tenant. However, a Commissioner shall be disqualified from ruling on a petition for an individual adjustment of a rent ceiling under Section 12, where the Commissioner is either the landlord of the property or a tenant residing in the property that is involved in the petition.

**Section 7.** SECURITY DEPOSITS.

Any payment or deposit of monies by the tenant, the primary function of which is to secure the performance of a rental agreement or any part of such agreement, including an advance payment of rent, shall be placed by he landlord, in an interest bearing account at an institution whose accounts are insured by the Federal Savings and Loan Insurance Corporation until such time as it is returned to the tenant or entitled to be used by the landlord. The interest earned by said payment or deposit on monies shall be returned *to the tenant annually, either through a rent rebate or cash payment, in December of each year. The balance of any interest earned by said payment or deposit on monies shall be returned* along with the appropriate part of the principal to the tenant upon departure from the premises.

**Section 8.** RENT REGISTRATION.

a. The Board shall require all landlords subject to the provisions of this Ordinance to file with the Board by September 1, 1980 a rent registration statement for each rental unit covered by this Ordinance. An owner who has resided in a single family dwelling for at least 365 consecutive calendar days need not file a rent registration statement under the provisions of this Ordinance if he/she rents this single family dwelling to another person or persons for a period not to exceed nine calendar months.

b. Landlords shall provide in their initial rent registration statement the following information:

(1) The address of each rental unit;

(2) the name and address of the landlord(s) and the managing agent, if any;

(3) The date on which the landlord received legal title to or equitable interest in the rental unit;

(4) The housing services provided for the rental unit;

(5) The rent in effect on June 6, 1978;

(6) The rent in effect on December 30, 1979;

(7) The base rent ceiling;

(8) The lowest rent in effect between June 6, 1978, and the date of the adoption of this Ordinance;

(9) The amount of any deposits or other monies in addition to periodic rent demanded or received by the landlord in connection with the use or occupancy of the rental unit;

(10) Whether the rental unit was vacant or occupied on May 31, 1980;

*(11) Rent in effect on December 31, 1981.*

c. All rent registration statements provided by landlords in accordance with this Ordinance shall include an affidavit signed by the landlord declaring under penalty of perjury that the information provided in the rent registration statement is true and correct.



d. The first annual-registration fee of twelve dollars ($12.00) per unit shall be paid by the landlords to the Board no later than September 1, 1980. Subsequent annual registration fees set in accordance with Section 6.n. of this Ordinance shall be paid no later than September 1 of each year.

e. The Board shall provide forms for the registration information required by this Section and shall make other reasonable efforts to facilitate the fulfillment of the requirments set forth in this Section.

f. Every annual registration fee required by this Ordinance which is not paid on or before September 1 is declared delinquent, and the Board shall add to said registration fee and collect a penalty of one hundred (100) percent of the fee so delinquent in addition to the fee. *Every sixty (60) days that the fee and penalty remain delinquent, the penalty shall be increased by one hundred (100) percent of the original fee. The Board may waive the penalty if payment is made within thirty (30) days of the original due date.*

*A landlord may request the Board to waive the penalty if he/she can show good cause for the delinquent payment.*

g. The amount of any registration fee and penalty imposed by the provisions of this Ordinance shall be deemed a debt to the City.

*h. Within thirty days after the filing of a rent registration statement, the Board shall provide a true and correct copy of said statement to the occupant of the respective unit.*

*i. Landlords of formerly exempt units shall register within sixty (60) days of coming under coverage of this Ordinance. The registration fee for this first-time registration shall be pro-rated based upon the number of months remaining to the next September 1 annual registration deadline.*

*j. No landlord shall be deemed to be in compliance with this Section with respect to a given unit until the landlord has completed registration for all covered units in the same property. Registration shall be deemed complete when all required information has been provided and all outstanding fees and penalties have been paid.*

*k. Registration fees shall not be passed along to the tenants without the express, prior approval of the Board. Under no circumstances shall penalties be passed along to tenants.*

**Section 9.** USE AND CONFIDENTIALITY OF INFORMATION SUBMITTED TO BOARD.

a. All information and forms required by this Ordinance and submitted to the Board shall not be used by any other governmental unit of the City of Berkeley for the enforcement of City of Berkeley Ordinances other than this Ordinance.

b. The Board shall adopt rules and regulations providing for the confidentiality of information submitted to the Board in support of a petition for an individual rent ceiling adjustment under Section 12 of this Ordinance when such confidentiality is deemed necessary by the Board.

**Section 10.** ESTABLISHMENT OF BASE RENT CEILING AND POSTING.

a. **Base Rent Ceiling.** Upon adoption of this Ordinance, no landlord shall charge rent for any rental unit covered by the terms of this Ordinance affecting rents in an amount greater than the lawful rent which was actually due and payable on, or last preceding, May 31, 1980, under the periodic term of the rental agreement, in accordance with the provisions of the Temporary Rent Stabilization Ordinance, No. 5212-N.S., except as permitted by the Board under Sections 11 and 12 of this Ordinance. Such lawful rent in effect on May 31, 1980, is the base rent ceiling and is a reference point from which the rent ceiling shall be adjusted in accordance with Sections 11 and 12. For such rental units where no rent was in effect on May 31, 1980, the base rent ceiling shall be the most recent lawful periodic rent in effect for that rental unit during the six months preceding that date. For such rental units where no periodic rent was in effect on May 31, 1980, or during the six months preceding that date, the base rent ceiling shall be a good faith estimate of the median rent in effect for comparable units in the City of Berkeley on May 31, 1980.

b. **Posting.** The Board may establish reasonable rules and regulations for the posting of rent ceiling and other relevant information to further the purposes of this Ordinance.



*c. **Previously Exempt Units.** For rental units specified in Subsection 5.f., the base rent ceiling shall be the rent in effect on December 31, 1981. For such rental units where no rent was in effect on December 31, 1981, the base rent ceiling shall be the most recent lawful periodic rent in effect for that rental unit during the six months preceeding that date. For such rental units where no periodic rent was in effect on December 31, 1981, or during the six months preceeding that date, the base rent ceiling shall be a good faith estimate of the median rent in effect for comparable units, located in the same census tract, and similar in age, size, maintenance, upkeep, and services.*

**Section 11.** ANNUAL GENERAL ADJUSTMENT OF RENT CEILINGS.

a. Once each year, the Board shall consider setting and adjusting the rent ceiling for all rental units covered by this Ordinance in general and/or particular categories of rental units covered by this Ordinance deemed appropriate by the Board. The Board shall hold at least two public hearings prior to making any annual general adjustment of the rent ceilings. ~~The first such public hearing shall be conducted no later than October 31, 1980 and the first annual general adjustment shall be made no later than December 31, 1980.~~ *The Board shall publish and publicize notices of the date, time, and place of the public hearings at least thirty (30) days prior to the hearing date. The two required public hearings shall be conducted and the annual general adjustment shall be set between September 1 and October 31, of each year. The annual adjustment shall become effective the following January 1.*

b. In making annual general adjustments of the rent ceiling, the Board shall:

(1) Adjust the rent ceiling upward by granting those landlords who pay for utilities a utility adjustment for increases in the City of Berkeley for utilities.

(2) Adjust the rent ceiling upward by granting landlords a property tax, maintenance and operating expense increase adjustment (exclusive of utilities) for increases in the City of Berkeley for property taxes and maintenace and operating expenses.

(3) Adjust the rent ceiling downward by requiring landlords to decrease rents for any decreases in the City of Berkeley for property taxes.

*(4) Adjust the rent ceiling downward by requiring landlords who pay for utilities to decrease rents for any decreases in the City of Berkeley for utilities.*

In adjusting rents *ceilings* under this subsection, the Board shall adopt a formula or formulas of general application. This formula will be based upon ~~a survey of~~ *the annual rent registration forms, surveys, information and testimonies presented at public hearings, and* other available data indicating increases or decreases in the expenses *relating to the rental housing market* in the City of Berkeley set forth in this subsection. For maintenance and operating expense adjustments, the Board may also use survey data from surrounding communities where appropriate. The Board shall make no more than one annual adjustment of rent ceilings per rental units per year.

*Adoption of a formula greater than forty-five percent (45%) of the increase in the Consumer Price Index for the twelve months ending the previous June 30 shall require the affirmative vote of six (6) Commissioners, other provisions notwithstanding. Adoption of such a formula shall be a specific and special exception to the requirement of only five (5) affirmative votes to make a decision. For the purposes of this subsection, the Consumer Price Index shall mean the Consumer Price Index for all urban consumers in San Franciso—Oakland, all items (1967 equals 100), as reported by the Bureau of Labor Statistics of the U.S. Department of Labor, as it pertains to the City of Berkeley.*

c. An upward general adjustment in rent ceilings does not automatically provide for a rent increase. Allowable rent increases pursuant to a general upward adjustment shall become effective only after the landlord gives the tenant at least a thirty (30) days written notice of such rent increase and the notice period expires.



d. If the Board makes a downward general adjustment in the rent ceilings, landlords of rental units to which this adjustment applies shall give tenants of such rental units written notice of the rent decrease to which they are entitled. Such rent decreases shall take effect not later than thirty (30) days after the effective date set by the Board for the downward general adjustment.

e. If the maximum allowable rent specified under this Ordinance for a rental unit is greater than the rent specified for such unit in the rental agreement, the lower rent specified in the rental agreement shall be the maximum allowable rent until the rental agreement expires. If the maximum allowable rent specified under this Ordinance for a rental unit is less than the rent specified for such unit in the rental agreement, the lower rent specified under this Ordinance shall be the maximum allowable rent.

f. No rent increase pursuant to an upward general adjustment of a rent ceiling shall be effective if the landlord:

(1) Has continued to fail to comply, after order of the Board, with any provisions of this Ordinance and/or orders or regulations issued thereunder, or

(2) Has failed to bring the rental unit into compliance with the implied warranty of habitability, *or*

*(3) Has failed to make repairs as ordered by the Housing Inspection Services of the City of Berkeley, or*

*(4) Has failed to completely register by September 1, except as provided in Subsection 11.g. below.*

*g. The amount of an upward general adjustment for which a landlord shall be eligible shall decrease by ten (10) percent per month for each month beyond December 1 for which the landlord fails to register.*

*h. A landlord who is ineligible to raise rents under an upward general adjustment for an entire calendar year shall not be eligible to raise rents under that particular general adjustment in future years.*

**Section 12.** INDIVIDUAL ADJUSTMENTS OF RENT CEILINGS.

a. **Petitions.** Upon receipt of a petition by a landlord and/or tenant, the rent ceiling of individual controlled rental units may be adjusted upward or downward in accordance with the procedures set forth elsewhere in this Section. The petition shall be on the form provided by the Board. The Board may set a reasonable per unit fee based upon the expenses of processing the petition to be paid by the petitioner at the time of filing. No petition shall be filed before September 1, 1980. Notwithstanding any other provision of this Section, the Board or hearing examiner may refuse to hold a hearing and/or grant an individual rent ceiling adjustment for a rental unit if an individual hearing has been held and decision made with regard to the rent ceiling for such unit within the previous six months.

b. **Hearing Procedure.** The Board shall enact rules and regulations governing hearings and appeals of individual adjustments of rent ceilings which shall include the following:

(1) **Hearing Examiner.** A hearing examiner appointed by the Board shall conduct a hearing to act upon the petition for individual adjustments of rent ceilings and shall have the power to administer oaths and affirmations.

(2) **Notice.** The Board shall notify the landlord if the petition was filed by the tenant, or the tenant, if the petition was filed by the landlord, of the receipt of such a petition and a copy thereof.

(3) **Time of Hearing.** The hearing officer shall notify all parties as to the time, date and place of the hearing.

(4) **Records.** The hearing examiner may require either party to an individual rent ceiling adjustment hearing to provide it with any books, records and papers deemed pertinent in addition to that information contained in registration statements. The hearing examiner shall conduct a current building inspection and/or request the City to conduct a current building inspection if the hearing examiner finds good cause to believe the Board's current



information does not reflect the current condition of the controlled rental unit. The tenant may request the hearing examiner to order such an inspection prior to the date of the hearing. All documents required under this Section shall be made available to the parties involved prior to the hearing at the office of the Board. In cases where information filed in a petition for an individual rent ceiling adjustment or in additional submissions filed at the request of the hearing examiner is inadequate or false, no action shall be taken on said petition until the deficiency is remedied.

(5) **Open Hearings.** All individual rent ceiling adjustment hearings shall be open to the public.

(6) **Right of Assistance.** All parties to a hearing may have assistance in presenting evidence and developing their position from attorneys, legal workers, recognized tenant organization representatives or any other persons designated by said parties.

(7) **Hearing Board.** The Board shall make available for inspection and copying by any person an official record which shall constitute the exclusive record for decision on the issues at the hearing. The record of the hearing, or any part of one, shall be obtainable for the cost of copying. The record of the hearing shall include: all exhibits, papers and documents required to be filed or accepted into evidence during the proceedings; a list of participants present; a summary of all testimony accepted in the proceedings; a statement of all materials officially noticed; all recommended decisions, orders and/or rulings; all final decisions, orders and/or rulings, and the reasons for each final decision, order and/or ruling. Any party may have the proceeding tape recorded or otherwise transcribed at his or her own expense.

(8) **Quantum of Proof and Notice of Decision.** No individual rent ceiling adjustment shall be granted unless supported by the preponderance of the evidence submitted at the hearing. All parties to a hearing shall be sent a notice of the decision and a copy of the findings of fact and

law upon which said decision is based. At the same time, parties to the proceedings shall also be notified of their right to and the time limit for any appeal allowed by the Board and/or to judicial review of the decision pursuant to this Section and Section 18 of this Ordinance.

(9) **Consolidation.** All landlord petitions pertaining to tenants in the same building shall be consolidated for hearing, and all petitions filed by tenants occupying the same building shall be consolidated for hearing unless there is a showing of good cause not to consolidate such petitions.

(10) **Appeal.** Any person aggrieved by the decision of the hearing examiner may appeal to the Board or to any appeals panel of the Board established by the Board, so long as such panel has at least three (3) Commissioners. On appeal the Board or panel shall affirm, reverse, remand, or modify the decision of the hearing examiner. The Board or panel may conduct a new (de novo) hearing or may act on the basis of the record before the hearing examiner without holding a hearing. An appeal to the Board shall be filed no later than thirty (30) days after receipt of the notice of the decision of the hearing examiner. The Board may set a reasonable appeal fee to be paid by the appellant at the time of filing the appeal.

(11) **Finality of Decision.** The decision of the hearing examiner shall be the final decision of the Board in the event of no appeal to the Board. The decision of the hearing examiner shall not be stayed pending appeal; however, in the event that the Board or panel reverses or modifies the decision of the hearing examiner, the Board shall order the appropriate party to make retroactive payments to restore the parties to the position they would have occupied had the hearing examiner's decision been the same as that of the Board's.

(12) **Time for Decision.** The rules and regulations adopted by the Board shall provide for final Board action on any individual rent adjustment petition within one hundred and twenty (120) days following the date of



filing of the individual rent ceiling adjustment petition, unless the conduct of the petitioner or other good cause is responsible for the delay.

(13) **Board Action in Lieu of Reference to Hearing Examiner.** The Board, on its own motion or on the request of any landlord or tenant, may hold a hearing on an individual petition for a rent ceiling adjustment without the petition first being heard by a hearing examiner.

c. In making individual adjustments of the rent ceiling, the Board or the hearing examiner shall consider the purposes of this Ordinance and shall specifically consider all relevant factors, including (but not limited to):

(1) Increases or decreases in property taxes;

(2) Unavoidable increases or any decreases in maintenance and operating expenses;

(3) The cost of planned or completed capital improvements to the rental unit (as distinguished from ordinary repair, replacement and maintenance) where such capital improvements are necessary to bring the property into compliance or maintain compliance with applicable local code requirements affecting health and safety, and where such capital improvement costs are properly amortized over the life of the improvement;

(4) Increases or decreases in the number of tenants occupying the rental unit, living space, furniture, furnishings, equipment, or other housing services provided, or occupancy rules;

(5) Substantial deterioration of the controlled rental unit other than as a result of normal wear and tear;

(6) Failure on the part of the landlord to provide adequate housing services, or to comply substantially with applicable state rental housing laws, local housing, health and safety codes, or the rental agreement;

(7) The pattern of recent rent increases or decreases;

(8) The landlord's rate of return on investment. In determining such return, all relevant factors, including but not limited to the following shall considered: the landlord's actual cash down payment, method of financing the property, and any federal or state tax benefits accruing to landlord as a result of ownership of the property;

(9) Whether or not the property was acquired or is held as a long-term or short-term investment; and

(10) Whether or not the landlord has received rent in violation of the terms of this Ordinance or has otherwise failed to comply with the Ordinance.

It is the intent of this Ordinance that individual upward adjustments in the rent ceilings on units be made only when the landlord demonstrates that such adjustments are necessary to provide the landlord with a fair return on investment.

d. No individual upward adjustment of a rent ceiling shall be authorized by the Board by reason of increased interest or other expenses resulting from the landlord's refinancing the rental unit if, at the time the landlord refinanced, the landlord could reasonably have foreseen that such increased expenses could not be covered by the rent schedule then in existence, except where such refinancing is necessary for the landlord to make capital improvements which meet the criteria set forth in Section 12.c.(3). This paragraph shall only apply to that portion of the increased expenses resulting from the refinancing that were reasonably foreseeable at the time of the refinancing of the rental unit and shall only apply to rental units refinanced after the date of adoption of this Ordinance.

e. Except for cases of individual hardship as set forth in Subsection 12.i. of this Ordinance, no individual upward adjustment of a rent ceiling shall be authorized by the Board because of the landlord's increased interest or other expenses resulting from the sale of the property, if at the time the landlord acquired the property, the landlord could have reasonably foreseen that such increased expenses would not be covered by the rent schedule then in effect. This Subsection (12.e.) shall only apply to rental units acquired after the date of adoption of this Ordinance.



f. No upward adjustment of an individual rent ceiling shall be authorized by the Board under this Section if the landlord:

(1) Has continued to fail to comply, after order of the Board, with any provisions of this Ordinance and/or orders or regulations issued thereunder by the Board, or

(2) Has failed to bring the rental unit into compliance with the implied warranty of habitability.

g. Allowable rent increases pursuant to an individual upward adjustment of the rent ceiling shall become effective only after the landlord gives the tenant at least a thirty (30) day written notice of such rent increase and the notice period expires.

h. If the Board makes a downward individual adjustment of the rent ceiling, such rent decrease shall take effect no later than thirty (30) days after the effective date set by the Board for the downward adjustment.

i. No provision of this Ordinance shall be applied so as to prohibit the Board from granting an individual rent adjustment that is demonstrated necessary by the landlord to provide the landlord with a fair return on investment.

**Section 13.** GOOD CAUSE REQUIRED FOR EVICTION.

a. No landlord shall be entitled to recover possession of a rental unit covered by the terms of this Ordinance unless said landlord shows the existence of one of the following grounds:

(1) The tenant has failed to pay rent to which the landlord is legally entitled pursuant to the lease or rental agreement and under the provisions of state or local law, unless the tenant has withheld rent pursuant to applicable law; *and said failure has continued after service on the tenant of a written notice setting forth the amount of rent then due and requiring it to be paid, within a period, specified in the notice, of not less than three days.*

(2) The tenant has continued, after written notice to cease, to substantially violate any of the material terms of the rental agreement, except the obligation to surrender possession on proper notice as required by law, and provided that such terms are reasonable and legal and have been accepted in writing by the tenant or made part of the rental agreement; *and provided further that, where such terms have been accepted by the tenant or made part of the rental agreement subsequent to the initial creation of the tenancy, the landlord shall have first notified the tenant in writing that he or she need not accept such terms or agree to their being made part of the rental agreement.*

(3) The tenant has willfully caused or allowed substantial damage to the premises beyond normal wear and tear and has refused, after written notice, to pay the reasonable costs of repairing such damage and cease damaging said premises.

(4) The tenant has refused to agree to a new rental agreement upon expiration of a prior rental agreement, but only where the new rental agreement contains provisions that are substantially identical to the prior rental agreement, and is not inconsistent with local, state and federal laws.

(5) The tenant has continued, following written notice to cease, to be so disorderly as to destroy the peace and quiet of other tenants or occupants of the premises.

(6) The tenant has, after written notice to cease, refused the landlord access to the unit as required by state or local law.

(7) *(A)* The landlord, after having obtained all necessary permits from the City of Berkeley, seeks in good faith to undertake substantial repairs which are necessary to bring the property into compliance with applicable codes and laws affecting the health and safety of tenants of the building or where necessary under an outstanding notice of code violations affecting the health and safety of tenants of the building, and where such repairs cannot be completed while the tenant resides on the premises.



*(B) Where such repairs can be completed in a period of sixty or fewer days, and the tenant, within thirty days after the service of a notice of termination of his or her tenancy, agrees in writing to vacate the premises during the period required to complete the repairs at no charge to the landlord, other than abatement of the obligation to pay rent for the premises during the period required to complete the repairs, the landlord may not recover possession pursuant to this Subsection 13.a.(7) unless the tenant shall fail or refuse to vacate the premises in accordance with such agreement.*

*(C) Where the landlord owns any other residential rental units in the City of Berkeley, and any such unit is vacant and available at the time of service of the written notice terminating the tenancy, or at any time thereafter until the earlier of the tenant's vacating the premises or the entry of a judgment by a court of competent jurisdiction awarding possession of the premises to the landlord, the landlord shall, as a condition of obtaining possession pursuant to this Subsection 13.a.(7), notify tenant in writing of the existence and address of each such vacant rental unit and offer tenant the right, at the tenant's option:*

*(1) to enter into a rental agreement (to be designated as a "temporary rental agreement") on any available rental unit which the tenant may choose, at a rent not to exceed the lesser of the lawful rent which may be charged for such available rental unit or the lawful rent in effect, at the time of the notice of termination of tenancy, on the unit being vacated, said rental agreement to be for a term of the lesser of ninety days or until completion of repairs on the rental unit being vacated by tenant, or;*

*(2) to enter into a new rental agreement or lease for such available rental unit at a rent not to exceed the lawful rent which may be charged for such available rental unit.*

*(D)* Where the landlord recovers possession under this subsection 13.a.(7), the tenant must be given the right of first refusal to re-occupy the unit upon completion of the

required work. *In the event landlord files an application for an individual rent adjustment within six months following the completion of the work, the tenant shall be a party to such proceeding the same as if he or she were still in possession, unless the landlord shall submit, with such application, a written waiver by the tenant of his or her right to re-occupy the premises pursuant to this subsection.*

(8) The landlord, after having obtained all necessary permits from the City of Berkeley, seeks in good faith to recover possession of the rental unit, in order to remove the rental unit from the market by demolition.

(9) The landlord seeks in good faith to recover possession for his or her own use or and occupancy as his or her principal residence, or for the use and occupancy as a principal residence by the landlord's spouse or by the landlord's ~~or the landlord's spouse's~~ child, *or* parent, ~~brother, sister, grandparents or grandchildren.~~ For the purposes of this subsection 13.a.(9), the term landlord shall be defined as the owner of record, *as of the time of giving of a notice terminating the tenant's tenancy, and at all times thereafter to and including the earlier of the tenant's surrender of possession of the premises or the entry of a judgment of a court of competent jurisdiction awarding possession of the premises to the landlord,* holding at least a 50% interest in the property and shall not include a lessor, sublessor, or agent of the owner of record. The landlord may not recover possession under this subsection 13.a.(9) if a comparable unit ~~is~~ *was, at the time of the landlord's decision to seek to recover possession of the rental unit,* already vacant and available in the property, *or if a comparable unit thereafter becomes vacant in the property at any time until the earlier of the tenant's surrender of possession of the premises or the entry of a judgment of a court of competent jurisdiction awarding possession of the premises to the landlord. In an action by or against the tenant, evidence that a comparable unit was vacant and available in the property within ninety days prior to the date of a notice terminating the tenant's tenancy shall create a presumption that such unit was vacant and available at the*



*time of the landlord's decision to seek to recover possession of the premises. "Presumption" means that the Court must find the existence of the presumed fact unless and until the contrary is proven by a preponderance of the evidence.*

(10) A landlord or lessor seeks in good faith to recover possession of the rental unit for his/her occupancy as a principal residence, where the landlord or lessor has previously occupied the rental unit as his/her principal residence and has the right to recover possession of the unit for his/her occupancy as a principal residence under an existing rental agreement with the current tenants.

*(11) The tenant fails to vacate a rental unit occupied under the terms of a temporary rental agreement entered into pursuant to the provisions of subsection 13.a.(7)(C), following expiration of the term of said temporary rental agreement, and following written notice of the availability of tenant's previous rental unit for re-occupancy by tenant (if the term of the rental agreement has expired by reason of the completion of repairs on the old rental unit), or of written notice to quit (if the term of the rental agreement has expired by reason of the expiration of a period of ninety days).*

b. A landlord's failure to specify good cause as listed above in subsections 1 through ~~10~~ *11* of Section 13.a. in the notice of termination or the notice to quit and in the complaint for possession shall be a defense to any action for possession of a rental unit covered by the terms of this Ordinance.

c. In any action to recover possession of a rental unit covered by the terms of this Ordinance, except an action to recover possession under subsections 13.a.(7), ~~and~~ 13.a.(8) *or 13.a.(11),* a landlord shall allege, *as to each rental unit on the property,* substantial compliance *as of the date of the notice of termination or notice to quit and as of the date of the commencement of the action for possession* with the implied warranty of habitability and compliance *as of the date of the notice of termination or notice to quit and as of the date of the commencement of the action for possession* with Sections 10 (Rent Ceiling) and 8 (Rent Registration) of this Ordinance.

*d. The landlord shall file with the Board a copy of any notice of termination, notice to quit, and/or summons and complaint, within ten (10) days after the tenant has been served with such notice or summons and complaint.*

**Section 14.** RETALIATION PROHIBITED.

No landlord may threaten to bring, or bring, an action to recover possession, cause the tenant to quit the unit involuntarily, *serve any notice to quit or notice of termination of tenancy,* decrease any services or increase the rent where the landlord's intent is retaliation against the tenant for the tenant's assertion or exercise of rights under this Ordinance. Such retaliation shall be a defense to an action to recover possession, or it may serve as the basis for an affirmative action by the tenant for actual and punitive damages and injunctive relief. In an action by or against a tenant, evidence of the assertion or exercise by the tenant of rights under this Ordinance within six months prior to the alleged act of retaliation shall create a presumption that the landlord's act was retaliatory. "Presumption" means that the Court must find the existence of the fact presumed unless and until ~~evidence is introduced which would support a finding of its nonexistence~~ *its nonexistence is proven by a preponderance of the evidence.* A tenant may assert retaliation affirmatively or as a defense to the landlord's action without the aid of the presumption *regardless of the period of time which has elapsed between the tenant's assertion or exercise of rights under this Ordinance and the alleged act of retaliation.*

**Section 15.** REMEDIES.

a. **For Violation of Rent Ceilings or Failure to Register.** If a landlord fails to register in accordance with Section 8 of this Ordinance, or if a landlord demands, accepts, receives or retains any payment in excess of the maximum allowable rent permitted by this Ordinance, a tenant may take any or all of the following actions until compliance is achieved:

(1) A tenant may petition the Board for appropriate relief. If the Board, after the landlord has proper notice and after a hearing, determines that a landlord has willfully and knowingly failed to register a rental unit covered



by this Ordinance or violated the provisions of Sections 10, 11 and 12 of this Ordinance, the Board may authorize the tenant of such rental unit to withhold all or a portion of the rent for the unit until such time as the rental unit is brought into compliance with this Ordinance. After a rental unit is brought into compliance, the Board shall determine what portion, if any, of the withheld rent is owed to the landlord for the period in which the rental unit was not in compliance. Whether or not the Board allows such withholding, no landlord who has failed to comply with the Ordinance shall at any time increase rents for a rental unit until such unit is brought into compliance.

(2) A tenant may withhold up to the full amount of his or her periodic rent which is charged or demanded by the landlord under the provisions of this Ordinance. In any action to recover possession based on nonpayment of rent, possession shall not be granted where the tenant has withheld rent in good faith under this Section.

(3) A tenant may seek injunctive relief on behalf of herself or himself to restrain the landlord from demanding or receiving any rent on the unit until the landlord has complied with the terms of this Ordinance.

(4) A tenant may file a damage suit against the landlord for actual damages when the landlord receives or retains any rent in excess of the maximum rent allowed under this Ordinance. Upon further proof of a bad faith claim by the landlord or the landlord's retention of rent in excess of the maximum rent allowed by this Ordinance, the tenant shall receive a judgment of up to seven hundred and fifty dollars ($750.00) in addition to any actual damages.

b. **For Violation of Eviction Proceedings.** If it is shown in the appropriate court that the event which the landlord claims as grounds to recover possession under Subsection 13.1(7), Subsection 13.a(8), Subsection 13.a.(9), or Subsection 13.a.(10) is not initiated within two months after the tenant vacates the unit, or it is shown the landlord's claim was false or in bad faith, the tenant shall be entitled to regain possession

and to actual damages. If the landlord's conduct was willful, the tenant shall be entitled to damages in an amount of $750 or three times the actual damages sustained, whichever is greater.

c. The City Attorney may bring an action for injunctive relief on behalf of the City or on behalf of tenants seeking compliance by landlords with this Ordinance.

d. The Board may seek injunctive relief to restrain or enjoin any violation of this Ordinance or of the rules, regulations, orders and decisions of the Board.

e. If a tenant fails to bring a civil or administrative action within one hundred and twenty (120) days from the date of the first occurrence of a violation of this Ordinance, the Board may either settle the claim arising from the violation or bring such action. Thereafter, the tenant on whose behalf the Board acted may not bring an action against the landlord in regard to the same violation for which the Board has made a settlement or brought an action. In the event the Board settles the claim it shall be entitled to retain from any payments made by the landlord, the costs it incurred in settlement, and the tenant aggrieved by the violation shall be entitled to the remainder.

**Section 16.** PARTIAL INVALIDITY.

If any provision of this Ordinance or application thereof is held to be invalid, this invalidity shall not affect other provisions or applications of this Ordinance which can be given effect without the invalid provisions or applications, and to this end the provisions and applications of this Ordinance are severable.

**Section 17.** NONWAIVERABILITY.

Any provision in a rental agreement which waives or modifies any provision of this Ordinance is contrary to public policy and void.

**Section 18.** JUDICIAL REVIEW.

A landlord or tenant aggrieved by any action or decision of the Board may seek judicial review in a court of appropriate jurisdiction.



**Section 19.** CRIMINAL PENALTIES.

*Any landlord who is found by a court of competent jurisdiction to be guilty of a willful violation of this Ordinance shall be subject to up to a five hundred dollar ($500) fine and/or ninety (90) days in jail for a first offense and up to a three thousand dollar ($3,000) fine and/or one year in jail for any subsequent offenses.*

## PART C. EFFECT OF PARTIAL INVALIDITY.

*If any provision of this Act or application thereof is held to be invalid, this invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provisions or applications, and to this end the provisions and applications of this Act are severable. This Act is intended to amend the provisions of the Rent Stabilization and Eviction for Good Cause Ordinance, and, in the event any provision of this Act or application thereof is held to be invalid, then the provisions of that Ordinance as in effect prior to their Amendment by this Act shall be deemed to apply.*

# APPENDIX H

# BAY AREA COUNCIL

## RENTAL HOUSING IN CALIFORNIA: OBSTACLES & OPPORTUNITIES

**April, 1983**

This discussion paper presents findings of a Bay Area Council study of the California and Bay Area climate for investment in rental housing. The Council is a business-sponsored public affairs organization active in local, regional, and state housing issues. The study is part of the Council's two-year Housing Action Program, which is aimed at encouraging production of more housing in the Bay Area. The program includes the participation of government, the housing industry, lenders, the academic community, consultants, nonprofit organizations, and citizen groups, as well as business.

### Why Business is Concerned

The business community has a direct interest in the availability of adequate rental housing in the area. Many business firms in the region report that their employees and operations are affected by a shortage of housing accessible to employment centers. Especially in light of the high cost of home ownership in the area, the problem is most acute for employees in the lower and middle salary ranges. In response, the Bay Area Council is working to advocate public policies that would encourage multi-family housing production, and identify sources of financing.

### The Context

There is presently a severe shortage of rental housing in the Bay Area, due to a sharp decline in rental production over the past few years. Builders identify several reasons for the lack of rental development, but the most critical is that rental development projects have not been economically feasible.



During the recent period of high interest rates, developers have suffered from what is often termed a "front-end" financing problem—that is, market rent levels have been too low to cover the costs of permanent development financing, particularly in the first year or two after project completion. Few developers have the ability to absorb continuing losses in hopes of some future payoff.

This pervasive and overriding problem has obscured the effects of other potential obstacles to rental housing, most notably rent control. With the seeming return of some stability to interest rates, the Bay Area Council believes the time is right for a reassessment of the climate for production of new rental housing in California and the Bay Area.

Conducted to determine what opportunities the California rental market currently holds for investors, the Council study has two components:

- an assessment of the state and regional (nine-county Bay Area) rental housing markets, including supply, anticipated demand, and potential risks and yields to investors. The study was conducted with the guidance of an advisory group consisting of economists and experts in the field of institutional investment.

- a nationwide survey of senior executives in major lending institutions, covering both those categories that have been involved in real estate lending in recent years (savings and loan associations, banks) and new sources (such as insurance companies and pension funds). The respondents to the survey constitute a sample of 79 lending institutions, estimated to represent several hundred billion dollars in assets.[1] One portion of the questionnaire was answered only by those lenders who reported some multi-family loan activity in the California market in the previous five years; survey results based on this smaller sample of 44 lenders are indicated with an asterisk.

[1] By category, the 79 survey respondents broke down as follows: 27 savings and loan associations (34%), 19 banks (24%), 16 insurance companies (21%), and 17 other alternative sources (22%).

**Summary of Findings**

Based on its findings, the Council has concluded that the California rental housing market has great potential to attract investment in the Eighties, but local- and state-government action will be needed to fulfill that potential.

- The outlook for investment in the Bay Area's rental housing market is promising, especially from a long-term perspective. The demand for new units is strong and getting stronger, the renter population is becoming more affluent, and in a reversal of recent trends, rents are beginning to keep pace with inflation.

- Lenders express a generally positive view of the California real estate market, and the potential for improvement in the economics of rental housing.

- If rental production is to increase substantially, California must attract not only those investors who have maintained some involvement in residential investment, but also new sources such as insurance companies and pension funds.

- Lenders perceive rent control as being by far the greatest disincentive to investment in the California rental market, and a large majority believe all communities in the state are affected, including those without rent control ordinances.

- Individual communities can take action to encourage investment in new rental units, but state-level action is also necessary.

**The California Market:**

**A Promising Outlook**

It appears that with lower interest rates, the economics of rental housing are generally becoming more favorable, particularly in a long-term context.



**Demand on the Upswing**

The demand for rental housing is very strong, as indicated by the region's declining vacancy rates. According to surveys by the Federal Home Loan Bank, multi-family vacancy rates dropped in almost all parts of the Bay Area over the past year, with most reporting vacancies close to 2%. (Generally, a vacancy rate of 4% to 5% is considered indicative of balanced supply and demand.)

Demand for rental units is expected to increase substantially in the years to come, because of a variety of factors including:

- the large number of Bay Area residents reaching the age of household formation (some 840,000 over the course of the decade, according to the Association of Bay Area Governments).

- a continuing trend toward smaller-sized households (an average of 2.7 persons per household in 1980, vs. forcasts of 2.36 to 2.39 in 1990).

- the high cost of home ownership in the region, which forces many households that would otherwise purchase a home to remain in the rental market.

- elderly homeowners choosing to sell their homes and rent apartments will add to the demand for rental units—a trend that may increase, since an increasing proportion of the population is aged 65 and over.

- expectations that between 314,800 and 496,500 jobs will be created in the Bay Area during the Eighties (according to ABAG and the Center for the Continuing Study of the California Economy).

At the same time, the supply of rental housing has been constrained. Rental housing production is at or near a postwar low. Since 1980, an average of fewer than 4,000 apartment permits have been issued each year in the nine-county region, a market decline from the 1976-80 average of 10,000 units annually.

**Rents are Rising**

After a decade of decline, real rent levels are rising, and it appears the market can still absorb a moderate increase in rents. This is critical to making rental projects economically attractive.

Bay Area rent levels have been somewhat low, according to market indicators. Rents have not been keeping pace with inflation. In fact, in inflation-adjusted terms, Bay Area rents actually declined between 1970 and 1980. This decline has reversed in the last two years, an important signal to investors. As of August, 1982, median monthly rent in the region was approximately $340.

There are several reasons why there may be room for moderate rent increases in some or all submarkets of the region:

- The Bay Area renter population has become more affluent, partly because high home prices force many who would otherwise buy to remain in the rental market. As of 1982, about 38% of households in the S.F./Oakland SMSA had annual earnings of $25,000 or more.

- Bay Bay Area renters expend a smaller portion of their incomes for rent than those nationwide (20.4% vs. 27% of monthly income, according to a 1980 housing survey by the U.S. Department of Commerce). It would require an immediate 22% increase in median rents to bring Bay Area renters up to the national median, in terms of share of income spent.

To sum up: if the "front-end" problem is eased through a stabilization of interest rates and moderate increases in rent levels, multi-family housing would seem to be a reasonably good long-term investment prospect, given the fundamental strength of the market.

It is important to note that while the Council's analysis was conducted on a regional basis, conditions can vary considerably among submarket areas, including demand, job creation trends, political climate, and potential for increased market rents. In other words, some areas may offer an investment climate that is considerably better than that for the region as a whole.



**Competitive Returns**

Many studies have compared the performance of real estate investments with stocks and bonds, and most lenders believe that real estate has an important place in long-term investment strategies. But only a handful of recent analyses have evaluated performance of real estate investments by property type. Of these, the three most significant found pre-tax apartment yields to be competitive with those for most other property categories in the 1970s.[2]

**How Lenders View the Market**

The real estate lenders surveyed support a generally positive economic outlook for the California rental housing market:

- 73% agree that "if market rents start to rise faster than inflation, lenders will be interested in lending on multi-family projects," and 72% agree with the prediction that "economic conditions will be favorable to multi-family rental projects in the near future."

- In response to an open-ended question on the most significant incentives, if any, for investment in the California market, the high level of demand for rental housing is the number-one factor named, by a wide margin. It is named first by 35% of those sampled.*

- 86% disagree with the statement, "No lender is interested in apartment development in California," and of those, almost two-thirds say they "strongly" disagree.

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[2] Sources: (1) John McMahan Associates, Inc., *Analysis of the American Council of Life Insurance Data Files in Real Estate Loans*, January, 1980; (2) Webb, James R., and Sirmans, C. F., "Yields and Risk Measures for Real Estate, 1966-77," *The Journal of Portfolio Management*, Fall, 1980; (3) Miles, Michael, and McCue, Thomas, "Historic Returns and Institutional Real Estate Portfolios," *AREUEA Journal*, Summer, 1982.

* Survey results based on that portion of the lenders sample reporting some multi-family loan activity the past five years (44 lenders).

In addition, the majority of those sampled do *not* indicate a generally negative disposition toward rental housing; 62% disagree with the statement, "Compared to other types of real estate, multi-family projects are an inherently inferior investment," with more than half of those disagreeing "strongly."

**The Opportunity:**

**A New Influx of Funds**

Since the last period of significant investment in California's rental housing market, conditions have changed substantially:

- The economics of investment in rental projects are somewhat different than before, with high interest rates and the "front-end" problem necessitating new approaches to financing.

- Federal deregulation of the financial services industry has expanded the investment choices available to savings & loan associations, which in the past have provided an estimated 60% of all residential financing in the nation. More recent federal action has given S&Ls substantial new sources of funds, but the extent to which they will invest in multi-family housing is uncertain.

- The political climate has also become more volatile; rent control and local land use policies have had a growing impact on the rental housing development process.

The need to attract financing to new rental housing is clear, based on declining production in recent years, and forecasts for growing demand in the near future. Now that the economy appears to be moving in a direction more favorable to real estate investment, there is also an opportunity to attract lenders to the California market.

Given the need for a dramatic increase in rental housing production, both recently active and new sources of residential financing must be tapped to revitalize the state's rental market.



While S&Ls and banks can no longer be relied upon to provide the major share of residential financing, they are familiar with real estate investment, and would be likely to seek and thoroughly evaluate re-emerging opportunities in the residential market.

At the same time, though large institutional investors such as insurance companies and private pension funds have not been active in residential financing in the recent past, they do have the characteristics needed to capitalize on the changing rental market. That is, they view immediate returns of individual investments as less important than overall, long-term performance and stability of their portfolios.

This means that these investors may be the best equipped to channel funds to a rental market that is still in flux, based on a promising economic outlook. It also makes them good candidates for innovative financing approaches, which generally involve deferral of investment returns to offset front-end operating income requirements. Finally, some institutional investors seek real estate investments to diversify their portfolios, as a hedge against unforeseen economic scenarios. Improving market conditions will enable them to justify investment in rental housing, as measured against alternative commercial and industrial property investments.

**The Obstacles:**

**A Look at Rent Control**

The Council's survey of lenders confirms what anecdotal evidence suggests: when the economics of rental housing are set aside, the presence of rent control in California is the most negative factor lenders see in the market:

- In response to the open-ended question, "What do you view as the greatest disincentive(s) for multi-family lending in California," more than 65%* of lenders named rent control, with 55%* naming it the number-one disincentive.

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* Survey results based on that portion of the lenders sample reporting some multi-family loan activity the past five years (44 lenders).

• In a subsequent question asking respondents to rank factors that may limit their interest in the California rental market, "the potential for enactment of rent control" was again ranked first, by a wide margin. Other factors, in rank order, were: tenant/landlord regulations, the costs of property management and maintenance, and local condo conversion regulations.*

Another question addressed in the survey is whether the presence of rent control in only a few California cities negatively affects the investment climate of the state as a whole. The survey results suggest that it does. Of the lenders surveyed, 82% agree that "Rent control is a threat to any new multi-family project in California, no matter where it is located," with 56% of the sample expressing "strong" agreement.

But despite the concern they express with the potential spread of rent control, lenders also indicate that this fear does not preclude all interest in the California rental market. Those who reported some multi-family loan activity in the state over the past five years were asked whether they would consider loaning on a project in a community with some form of rent control; while half said they were unlikely to consider such a move, 36% said they would consider such a loan application.*

**The Call to Action**

Obviously, the constraining effect of rent control on the production of new rental units is not an easy issue to address. A case can certainly be made for protection of existing tenants from excessive rent increases. But the dampening effect of rent control on the market suggests that such regulation offers only short-term protection for the renter population. In the long run, the production of an adequate supply of rental housing is the most effective deterrent to higher-than-market rents.

Based on the results of its lender survey, the Council has concluded that action to ease rent control's effect on the investment climate must be taken at both the local and state levels.

* Survey results based on that portion of the lenders sample reporting some multi-family loan activity the past five years (44 lenders).



Local governments can take steps to attract and encourage investment by those lenders who will consider investment in communities with rent control (36%* of those surveyed by the Council), or who are inclined to evaluate specific projects and communities on a case-by-case basis, rather than making statewide or areawide market assessments. Some 80% of lenders indicate that the existence of local rent control exemptions for a specific project would increase their interest in lending on that project.

But many lenders, particularly large institutional investors, are unlikely to conduct localized market assessments in pursuit of individual projects, and will rely on more sweeping views of the market—particularly when it comes to rent control. This is evidenced by the fact that 82% of lenders surveyed see rent control as a "threat to any new multi-family project in California," no matter what its location.

State-level action would also provide lenders with a considerably greater degree of security and encouragement than localized approaches to rent control, survey results indicate.

• Nearly 90%* indicate that State-level statutory changes to pre-empt local rent controls would increase their interest in making multi-family loans in California.

• Of those lenders who have had some multi-family loan activity in the California market, only 29% agree that "contractual exemption from rent control is enough to make a multi-family project attractive to lenders," while 39% disagree.

• Large institutional investors are even less inclined to be satisfied with local contractual exemptions, as evidenced by the fact that only 13% of insurance companies surveyed believe such exemption would be enough to make a project attractive.

• 53% agree that "multi-family lending won't become attractive until there is state-wide pre-emption of *all* local rent controls," while 27% disagree.

* Survey results based on that portion of the lenders sample reporting some multi-family loan activity the past five years (44 lenders).

Based on these findings, the Council recommends the following approaches to local and state-level action:

**Local Government**

In recent years, some communities and builders have taken the initiative to propose project-specific exemptions from existing or future rent control ordinances for specific projects. The use of development agreements, as authorized by a California State law (AB 853) enacted in 1979, comes closer than any other vehicle to providing a contractual exemption from future controls that cannot be rescinded by future governmental decisions.

Local governments can facilitate investment in rental projects, particularly small and medium-sized developments, by offering and encouraging such exemptions. Use of this approach has been increasing, and while some developers are reluctant to rely on a guarantee that has not been tested in the courts, many are confident that such agreements could withstand legal challenge.

Another technique being used at the local level is development of apartments with underlying condominium maps, accompanied by a development agreement requiring that the units remain in rental for a set period of time. This approach provides developers with the flexibility needed to assure a reasonable level of return with minimum risk; the primary disadvantage is the likelihood of somewhat higher development costs due to stricter condo building requirements.

**State Government**

Precedent exists for state-level action to preempt or limit local authority to enact rent controls. The California Housing Finance Agency is the instrument through which the State provides financing and pre-development loans for new housing development (primarily low- and moderate-income units). CHFA's founding statute and subsequent State legislative action have exempted rental housing financed by CHFA from state- or locally-imposed rent controls, in order to provide the Agency with secure market-rate yields from the projects it underwrites.



Private investors are no less in need of such certitude, if they are to provide housing producers with funds to substantially increase the supply of rental housing in the state and the Bay Area.

State-level action on rent control could take a variety of forms, each of which would raise a distinct set of issues. But fundamentally, such action would require some limitation on local authority to enact or enforce rent control, whether in the form of guidelines or some degree of pre-emption.

Without recommending among specific approaches, the Bay Area Council urges the California Legislature and the new State Administration to address, in every way possible, the issue of rent control and the need to spur private investment in housing for the renters of California.